United States Court of Appeals

for the Second Circuit

APPENDIX

76-7348

United States Court of Appeals

For the Second Circuit

B

BOSTON M. CHANCE, LOUIS C. MERCADO, *et al.*,
Plaintiffs-Appellees,

against

THE BOARD OF EXAMINERS,
Defendant-Appellant,

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK
and THE CHANCELLOR OF THE CITY SCHOOL DISTRICT,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

VOLUME II

UNITED STATES COURT OF APPEALS
FILED
OCT 6 1976
J. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PAGINATION AS IN ORIGINAL COPY

APPENDIX

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Docket Entries

CIVIL DOCKET

UNITED STATES DISTRICT COURT

10 1a 1 - 71

Jury demand date:

70 CIV. 4141

U. S. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
BOSTON H. CHANCE and LOUIS C. MERCADO, individually on behalf of all others similarly situated, v. THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: GERTRUDE E. UNGER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROSNOWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; DONNY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH B. ROBINSON JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York.	For plaintiff: JACK GREENBERG, JONATHAN SHAPIRO 10 Columbus Circle, N.Y.C.N.Y. 10019 For defendant: Bd. of Education; J. Lee Rankin Corporation Councel - City of New York Municipal Building New York, NY 10007 Bd. of Examiners; Kaye, Scholer, Fierman, Hays & Handler 425 Park Ave. New York, NY 10022

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk				
J.S. 6 mailed	Marshal				
Basis of Action: Violation CIVIL RIGHTS	Docket fee				
Action arose at:	Witness fees				
	Depositions				

Board of Examiners, Board of Education City of New York, et al 70 CIV. 4147

PROCEEDINGS

Files Complaint and issued Summons.

Filed pltffs Notice of Motion. Re; Prel. Inj. Ret. 10-6-70

Filed Request and Order designating Ann Wagner to serve summons and complaint. So ordered. Clerk.

Filed summons - copies accepted.

Filed Order to Show Cause re: Intervene Ret. 10/6/70.

Filed Amended Complaint. (1)

Filed Affidavit of Arnold Webb and Exhibit, in support of motion for pre.inj.

Filed Supplemental Memorandum of Points and Authorities in support of motion for pre.inj.

Oct.26-70 Filed OPINION #37186. Mansfield, J. The motion to intervene is denied. It is so ordered. (mailed notice)

ov. 4,70 Filed Order that pending the determination of this motion, the defts are restrained from promulgating or otherwise publishing any new eligible lists for supervisory service positions in the New York City school system as indicated. Mansfield J.-mailednotice.

c.16-70 Filed Notice of Motion re: Allow Class Action. Ret. 12/29/70.

c.16-70 Filed Memorandum of Points and Authorities in support of pltfs', motion to allow class action.

ec.30-70 Filed Notice of Settlement and Order. Ordered that The Board of Examiners shall prepare two lists of the candidates for the supervisory examinations listed on Exhibit A, etc. and a copy of the name and address list shall be served by hand upon counsel for the Board of Education, etc. Information concerning the ethnicity of individuals obtained pur. to this order is to be used solely for the purpose of tabulating the pass-fail statistics requested by the Court in the present action, etc. So ordered. Mansfield, J. (mailed notice).

ec.31-70 Filed 3 Envelopes ordered to be sealed and impounded pur. to order of 12/30/70 and Placed in Vault Room 602.

Jan.16-71 Filed two (2) Red Portfolios containing Affidavit of Harold Siegel, with lists of names, addresses, and present school or office location and position of individuals currently employed in the New York School System.

Jan.19-71 Filed Affidavit containing the ethnicity of the individuals in the School System.

Jan.20-71 Filed Affidavit containing the ethnicity of the individuals listed in the School Syst with envelope attached containing the list.

Jan.20-71 Filed Affidavit containing the ethnicity of the individuals listed, with envelope attached containing list, by Simon S. Silverman.

Jan.20-71 Filed Affidavit of Arthur Clinton re: the ethnicity of the individuals listed in the list contained in the envelope attached.

an.21-71 Filed one envelope containing list of ethnicity of indivuals (no affidavit).

an.21-71 Filed one envelope containing ethnicity list of indivuals, and affidavit of Seelig Lester.

an.21-71 Filed one envelope containing ethnicity list of indi uals, and affidavit of Maurice Wollin.

Jan.21-71 Filed one envelope containing affidavit of Josephine S. O'Brien and list of ethnicity of individuals. (Impounded in Vault Room 602).

Jan.21-71 Mailed photocopies of the returned affidavits to counsel for the respective parties.

Jan 22,71 Filed one envelope containing affidavit of Myer Boland and list of ethnicity of individuals. (Impounded in Vault Room 602)

Jan 22,71 Filed one envelope containing affidavit of Juliet Saunders and list of ethnicity of individuals. (Impounded in Vault Room 602)

an 22,71 Filed one envelope containing affidavit of Dr. Max B. Meyers and list of ethnicity of individuals. (Impounded in Vault Room 602)

continued next page

Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment
Jan.22-71	Filed One envelope containing list of ethnicity of individuals and affidavit of Dr. Irving Barchuck.	
Jan.22-71	Filed One envelope containing list of ethnicity of individuals and affidavit of Abraham P. Tauchner.	
Jan.22-71	Filed One Envelope containing list of ethnicity of individuals and affidavit of Jacob B. Zack.	
Jan 22,71	Filed One Envelope containing list of ethnicity of individuals and affidavit of Murray Hart. (Impounded in Vault Room 602)	
an 25,71	Filed one envelope containing affidavit of Carmella Nesi and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Dolores Chitraro, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Carl B. Endberg, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Rose L. Schwab, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Charles I. Schonhaut, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Eugene T. Maleska, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Elizabeth C. O'Daly, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Nellie R. Duncan, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
n 25,71	Filed one envelope containing affidavit of Anthony J. Ferreri, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
n 25,71	Filed one envelope containing affidavit of Elliott S. Shapiro, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
an 25,71	Filed one envelope containing affidavit of Dr. Edwin J. Hass, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
an 25,71	Filed one envelope containging affidavit of Ralph T. Brando, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
an 25,71	Filed one envelope containing affidavit of Helene M. Lloyd, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
an 25,71	Filed one envelope containing affidavit of Max G. Willinstein, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Dr. Edythe J. Gaines, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 25,71	Filed one envelope containing affidavit of Alfredo Mathew Jr., and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 26,71	Filed one envelope containing affidavit of Martin W. Frey, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 26,71	Filed one envelope containing affidavit of Cormac K. Meagher, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
an 27,71	Filed one envelope containing affidavit of Theodore Miesenthal, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 27,71	Filed one envelope containing affidavit of Hugh McDougall Jr., and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan27,71	Filed one envelope containing affidavit of Frederick H. Williams, Assist. Supt., letter of Frederick H. Williams Assist. Supt., Affidavit of Frederick H. Williams, Executive Director office of personal, letter of Madeline H. Morrissey, Assist. Exec. Director, and affidavit of Mary Mallerca, Community Superintendent, and list of ethnicity of individuals. (Impounded in Vault)	

Continued on back page.

4141 Boston M. Chance et al vs. The Board of Examiners and the Board of Education

DATE	PROCEEDINGS	Date Order or Judgment No.
Jan.26,71	Filed one envelope containing affidavit of Samuel D. McClelland, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan.29-71	Filed Notice of Motion re: Add Parties. Ret. 2/9/71.	
Jan.29-71	Filed Memorandum in support of pltfs'.motion to add parties.plaintiff.and amend caption.	
Feb.3-71	Filed Affidavit of Stanley Taylor, and placed in Envelope.	
Feb.5-71	Filed Answering Affidavit of Mark A. Jacoby re pltfs'.motion to add pltfs. and to amend amended complaint.	
Feb.8-71	Filed Affidavit of ethnicity of individuals by Elmer McBarnette.	
Feb.10-71	Filed Affidavit of ethnicity of individuals by Andrew S. Donaldson.	
Feb.10-71	Filed M-T-D.-BMD. on motion papers filed 1/29/71. Motion granted on default. So ordered. Wyatt, J.	
Feb.17-71	Filed Notice of Settlement and Order. Filed order that National Opinion Research Center is appointed to obtain and furnish to the court and the parties, evidence as to the ethnicity of all applicants for the examinations for for supervisory service positions listed on Exhibit A-1, who are not currently employed in the New York City school System,etc.etc. So ordered. Mansfield, J. (mailed notice).	
Feb.23-71	Filed AMENDED COMPLAINT - CLASS ACTION.	
Mar.9-71	Filed Supplemental Affidavit of Thomas McGee, dated 3/4/71. Place in Vault Room 602.	
Mar.2[illegible]-71	Filed a Report filed pur. to Judge Mansfield's Order of 2/16/71.	
Mar.31-71	Filed Request for Production of Documents under Rule 34.	
Apr.1-71	Filed Supplementary Report pur. to Judge Mansfield's order of 2/16/71.	
Apr.6-71	Filed Affidavit of Frederick H. Williams as to ethnicity of individuals.(Supplementary #4)	
Apr.12-71	Filed Request for Production of Documents under Rule 34.	
Apr.13-71	Filed Supplemental Affidavit of Thomas McGee, and placed in Vault Room 602.	
Apr.14-71	Filed letter from University of Chicago re: signature of applicant Julius Berlman which has now been signed designating himself as "Caucasian or other".	
Apr.13-71	Filed Notice of Settlement and (Counter) Order. Ordered that the orders of this Court dated 12/29/70 and 2/16/71 are modified to the extent indicated, (1) The Clerk of the Court is directed to immediately transmit to counsel for the Board of Education the copy of the "pass-faillist" and covering affidavits of Thomas McGee, Administrator of the Board of Examiners, heretofore filed and sealed pur. to this Court's Order of 12/22/70, etc.etc. Mansfield, J. (mailed notice).	
Apr.16-71	Filed letter from National Opinion Research Center, Applicants whose race/ethnicity in the NORC report to the court of 3/20/71 was originally designated as not employed by the N.Y.City school system have stated to that organization that they are in the New York City school system . names starting with Pearl Crystel Scher, ending with James W. Salta.	
Apr.22-71	Filed Affidavit of Jacob B. Zack, Asst. Supt., Office of High Schools re: ethnicity of individuals listed. (Impounded and Placed in Vault Room 602).	
Apr.22-71	Filed Affidavit of Frederick H. Williams, Executive Director for Personnel, Office of Personnel re: ethnicity of individuals listed. (Impounded and Placed in Vault). One Envelope.	
Apr.26-71	Filed transcript of Record of Proceedings of Dec.16,1970.	
Apr.27-71	Filed Affidavit of Frederick H. Williams, Exe. Director for Personnell of ethnicity.	
Apr.27-71	Filed Affidavit of " " " " " " " re: ethnicity information gathered by N.O.R.C.	
Apr.27-71	Filed Summary ethnicity information gathered by N.O.R.C. (includes PE 1 - 50) and impounded and placed in Vault Room 602.	
Apr.28-71	Filed Affidavit of Thomas McGee dated Apr. 26,1971 Re: Pass-fail lists. impounded and placed in vault -room 602 in original Pass-fail envelope.	
Apr.27-71	Filed Response to Request to Produce Documents.	

continued next page

CIVIL 4111 BOSTON M. CHANCE, etal vs. THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

5a

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
Apr.29-71	Filed Affidavit of Elizabeth B. Dubois in support of pltfs'.proposed order.
Apr.29-71	Filed Affidavit in opposition to pltfs'.proposed order. (of Mark A. Jacoby)
Apr.29-71	Filed Notice of Settlement and Order. Ordered that the order of this court dated 4/13/71 is amended as indicated; so ordered. Mansfield, J.(mailed notice)
Jul 14-71	Filed OPINION #37792. We conclude that a sufficient showing has been made of violation of the Equal Protection Clause of the 14th Amendment to warrant the issuance of preliminary injunctive relief. *** For the foregoing reasons a preliminary injunction will issue restraing defendants from (1) conducting further examinations of the type found to be unconstitutionally discriminatory against Blacks and Puerto Ricans, and from (2) promulgating eligible lists on the basis of such examination procedures. The foregoing shall constitute our findings of fact and conclusions of law required by Rule 52(a) FRCP. SETTLE ORDER ON NOTICE. Mansfield,J.(mailed notices).
Jul 20-71	[illegible] 11-19-70
Jul 20-71	[illegible] 5-21-71
Jul.23-71	Filed notice of settlement & Interim injunction; ordered that pendin the settlement of a preliminary injunction, deft's their agents, are restrained from announcing or conducting further examinations for supervisory service positions in the New York City School, system, etc. Mansfield,J.
SEPT 20 71	Filed Affdvt of Marvin Weingart, in support of deft Board of Examiners' proposed preliminary injunction.
SEPT 20 71	Filed Affdvt of Thomas McGee, in support of deft Bd. of Examiners' proposed preliminary injunction.
SEPT 20 71	Filed Affdvt of service re: pltff's memorandum in response to proposed preliminary injunction.
SEPT 20 71	Filed Memorandum in support of pltffs' proposed order for preliminary injunctive relief.
SEPT 20 71	Filed Memorandum in support of proposed preliminary injunction submitted by Deft Board of Examiners.
SEPT 20 71	Filed Pltffs' memorandum in response to proposed preliminary injunction submitted by deft Bd. of Examiners.
SEPT 20 71	Filed Memorandum Re: Preliminary Injunction by Mansfield, J.
SEPT 20 71	Filed PRELIMINARY INJUNCTION - Ordered that defts, their agents, etc. are hereby, pending the determination of this action, restrained as indicated. Mansfield, J. (mailed notices)
OCT 1 71	Filed NOTICE OF APPEAL $5.00 by Charles Wiener & Oscar Goetlieb from decision for pltffs dated 9-17-71. Mailed notices.
Oct.15-71	Filed deft's notice of appeal from order entered on 9-20-71: Mailed copies to E. DuBois, & J. Lee Rankin.
Oct.6/70	Filed (in court) Pltf./order to show cause.
Oct.20/70	Filed (in court) Aff. of Stanley Kantor in support of motion to inte
Oct.20/70	Filed (in court) supplemental memorandum in opposition to motin to i
Oct.20/70	Filed(in court) memo. in support of motion to intervene.
Oct.20/70	Filed(in court) supplemental affidavit in support of motion to inte
Oct.20/70	Filed(in court) Brief amicus curiae submitted on behalf of Aspira o America, Inc.
Oct.20/70	Filed (in court) affidavit in support of motion for preliminary in
Oct.23/70	Filed memo. in opposition to pltff's motion for a preliminary inju submitted by deft. board of examiners.
Oct.27/70	Filed (in court) Affidavit of Gertrude E. Unser.
Oct.27/70	Filed (in court) Affidavit of Murray Rockowitz.
Oct.27/70	Filed (in court) Affidavit of Jay E. Greene.
Oct.27/70	Filed (in court) Affidavit of Murry Bergtraum.
Oct.28/70	Filed Brief of N.Y. Assoc. of Black School Supervisors and Administ as Amicus Curiae.

DATE	PROCEEDINGS	Date Order Judgment
Oct.26/71	Filed Memo. in reply to defts. memo. opposing pltffs' motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct. 28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit of William H. Ennis.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed supplemental memo. in opposition to pltffs' motion for preliminary injunction-submitted by deft. Board of examiners.	
Oct.28/71	Filed mimo. on relevance of statistical tabllations submitted in support of pltffs' motion for preliminary injunction.	
Oct.28/71	Filed supplemental Affidvit of Jacob Cohen, in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit on the significance of statistical tabulations, submitted support of motion for preliminary injunction.	
Oct.28/71	Filed Second supplemental affidavit of Jacob Cohen in support of motion for preliminary injunction.	
Oct. 28/71	Filed Second supplemental briefin opposition to prelim. injunction.	
Oct. 28-71	Filed brief of Public Assoc. Education of City of N.Y.	
Oct. 28-71	Filed affdvt. of Nathan Jaspen.	
Oct. 28-71	Filed supplemental brief of the NY Assoc. of Black School Supervisors as amicus.	
Oct. 28-71	Filed affdvt. of Richard S. Barrett re: research studies.	
Oct. 28-71	Filed reply affdvt. of Dr. Murray Rockowitz.	
~~Oct. 3-71~~ (11-21)	~~Filed memorandum of law in opposition to pltffs' motion to allow a class action- submitted by Deft. Bd. of Examiners.~~	

A TRUE COPY
JOHN LIVINGSTON, Clerk
By Edward A. Parker
Deputy Clerk

Motion for Preliminary Injunction filed
on September 24, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, individually on behalf of all others similarly situated,	
v.	
THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York.	CIVIL ACTION No. 74 Civ. 4141

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move the court for a preliminary injunction enjoining the defendants, Board of Examiners of the City of New York; Gertrude E. Unser, Chairman; Jay E. Greene, Murray

Rockawitz and Paul Denn; and the Board of Education of the City of New York, Murry Bergtraum, President; Isaiah E. Robinson, Jr., Vice-President; Seymour P. Lachman, Mary E. Meade and Joseph Monserrat, Harvey B. Scribner, Chancellor and Theodore H. Lang, Deputy Superintendent, their agents, servants, employees, successors, and all other persons in concert and participation with them, pending the final hearing and determination of this action, from:

(a) administering or otherwise making use of any written and/or oral test, for New York City license of elementary school principal or for any other New York City public school system supervisory license, which has not been prepared and validated in accordance with the latest standards of professional psychological testing as accurately measuring the merit and fitness of candidates to perform the tasks of the position for which the testing is being administered; and from

(b) administering or otherwise making use of any examination for principal which has not been prepared in accordance with, which does not strictly adhere to, and which in no way exceeds specific academic and professional standards for the license of principal established by the Board of Education pursuant to §2573(10) of the New York Education Law, on the grounds that:

(1) unless restrained by this Court defendants will perform the acts referred to;

(2) such action by the defendants will result in irreparable injury, loss and damage to the plaintiffs, as more particularly appears in the complaint, annexed affidavits, memorandum in support of preliminary injunction and exhibits attached thereto;

(3) the issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable injury to plaintiffs.

JACK GREENBERG
JONATHAN SHAPIRO
10 Columbus Circle
New York, N.Y. 10019
Phone (212) 586-8397

Attorneys for Plaintiffs

Of Counsel

GEORGE COOPER
435 West 116th Street
New York, New York 10027

ELIZABETH B. DUBOIS
STEPHEN G. YOUNG
10 Columbus Circle
New York, New York 10019

AFFIDAVITS IN SUPPORT OF MOTION SUBMITTED ON SEPTEMBER 24, 1970

Affidavit of John R. Nailor verified on
September 22, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al., Plaintiffs,	:	CIVIL ACTION No. Civ.
v.	:	
BOARD OF EXAMINERS, et al., Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JOHN R. NAILOR, being duly sworn, deposes and says:

1. My name is John R. Nailor and I am the Acting Principal of P.S. 68 in Manhattan.

2. I have worked in the New York City elementary schools for 23 years and I hold the New York City licenses of Teacher of Common Branches and Assistant to Elementary School Principal.

3. Based on my experience with the Board of Examiners' tests it is my opinion that the examinations require more skill in the techniques of taking examinations than they require in educational knowledge or job skill. Since blacks and Puerto Ricans on the whole have had difficulty in securing the necessary examination techniques -- as opposed to securing the necessary

skills for doing the job -- the system is thus discriminatory against black and Puerto Rican personnel. Generally, up until the very recent past it has been extremely difficult or impossible for blacks and Puerto Ricans to participate in the special private coaching courses which have been used to prepare candidates for the examinations. Among the reasons for this difficulty are the high cost of such courses and the distant locations in which they were frequently held. This situation has resulted in the cumulative lack of test taking know-how on the part of blacks and Puerto Ricans. If Board of Examiners' tests truly measured or predicted job competency, then perhaps there could be some justification for perpetuating these tests in their present form. However, since I feel that these tests do not perform any such function, their continued use can have no effect other than to perpetuate the inequities of the past.

4. The examinations themselves laying great stress as they do on a written essay portion require the skill of speedy writing. Skillful speed writing, I submit, has no relevance to success on the job.

5. The examination system further magnifies the effects of deprivations of blacks and Puerto Ricans in that there are very few blacks and Puerto Rican members of the supervisory hierarchy which drafts the questions and grades the answers. Since it is undeniable that the experiences of blacks and Puerto Ricans are frequently different from those of middle class whites, the results of the system in terms of magnifying cultural differences to the detriment of minority persons are obvious.

6. Further evidence of the invalidity of Board of Examiners tests is supplied by the fact that no attempt is made to individualize qualifications for licenses to meet the needs of specific school populations. The tests are given on a citywide basis so that the very same criteria are used to license both persons who will serve the predominantly white middle class school and predominantly non-white ghetto schools. Leadership experience and community rapport are granted negligible weight in the grading of examinations.

7. To my knowledge there has never been an correlation between success or lack of success on Board of Examiners' tests and the ability of individuals to do the job being tested for.

John R Nailor
John R. Nailor

Signed and sworn before me
this 22 day of Sept, 1970.

Notary Public

ANNE ABRAMS
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-0006635
Qualified in New York County
Commission Expires March 30, 1971

Affidavit of Alfredo Mathew, Jr. verified on
September 22, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al., Plaintiffs,	:	CIVIL ACTION No. Civ.
v.	:	
BOARD OF EXAMINERS, et al., Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) SS.:
COUNTY OF BRONX)

ALFREDO MATHEW, JR. being duly sworn, deposes and says:

1. My name is Alfredo Mathew, Jr. and I reside at 50 Orange Street, Brooklyn, New York 11201. I am the regularly appointed principal of Junior High School 98, 1619 Boston Road, Bronx, New York 10460.

2. I graduated with a B.A. degree cum laude from City College of New York in 1955. I earned a M.A. from City College of New York in 1961 and I am presently a Ph.D. candidate in Educational Sociology at New York University.

3. I have been continuously employed in the New York City school system since 1954. I hold the following New York City licenses: Regular Teacher of Social Studies, Junior High School; Regular Teacher of Social Studies, Senior High School; Assistant Principal, Elementary School; Assistant Principal,

Junior High School; Social Studies Chairman, Junior High School; and Principal of Junior High School. I also hold New York State certification as Principal and as District Superintendent.

4. I served briefly in 1969 as an assistant examiner for defendant Board of Examiners in which position I helped to administer the examination for assistant principal of junior high school. Just prior to my serving in that position, when I was working at the Board of Education as a supervisor of bilingual teachers, I was horrified to learn that the personnel at the Board of Examiners who prepared the examination for this position were almost totally deficient in either a knowledge of the job of bilingual teacher or of the Spanish language and the Puerto Rican-Hispanic culture. My distaste for the crudeness and unimaginativeness of the examination system was confirmed by my subsequent experience as an assistant examiner. I was shocked by the pat answers which were prepared by the Board of Examiners' chosen experts as guides for the assistant examiners such as myself in evaluating the candidates.

5. It is my opinion that the examination techniques place pressure on the assistant examiners to pass candidates who have mastered the mnemonical approach to supervision. Not only is it my feeling, based on my experience, that the Board of Examiners' system does not produce tests which measure the capacity of the candidates to do the job being tested for; but I further believe that this system and the kind of "successful" candidate it produces is in large measure responsible for the failures of our school system.

6. I would further emphasize the fact that questions and interviews of Board of Examiners' tests are composed by the very

supervisors whose failures have in large measure precipitated our current educational crisis. Thus, the Board of Examiners' system is specifically geared to "inbreeding" and therefore, to perpetuating the inadequacy of the system. There is no question in my mind that the Board of Examiners' procedures do not measure merit and fitness, but rather that they sustain expediency and cynicism.

Alfredo Mathew

ALFREDO MATHEW, SR.

Signed and sworn before me
this 22nd day of Sept, 1970.

Rogelio Fabelo

Notary Public

ROGELIO FABELO
Notary Public, State of New York
No. 03-8731367
Qualified in Bronx County
Commission Expires March 30, 1972

Affidavit of Peter J. Strauss verified on
September 22, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al.,	:	
Plaintiffs,	:	CIVIL ACTION No.
v.	:	Civ.
BOARD OF EXAMINERS, et al.,	:	
Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

PETER J. STRAUSS, being duly sworn, deposes and says:

1. I am an attorney-at-law and partner in the firm of Moldover Hauser and Strauss with offices at 110 East 42nd Street, New York, New York. I am presently Chairman Pro-Tem of Community School Board #2 in the Borough of Manhattan. Formerly I was a member of Local School Board #2, whose jurisdiction covered most of the East Side of Manhattan. The Community Board took office, and the Local Board ceased to exist, on July 1, 1970 pursuant to Article 52-A of the New York Education Law which established the New York City Community School District System.

I am submitting this affidavit on my own behalf and not in my official capacity.

2. I served on the old Local Board for approximately two years, up to the time it ceased to exist. This affidavit will concern itself with certain of my experiences on that board.

3. One of my official duties as a member of the Local Board was to select supervisory personnel, such as Principals and Assistant Principals, for schools in the District. During the first year of my tenure, the responsibility was relatively limited we selected from competitive lists of licensed persons under procedures which enabled us to choose among only the top three persons on the appropriate list. Subsequent modification of the Education Law permitted us to consider all persons on the appropriate list, which usually included more than one hundred persons. In addition, we considered numerous persons not on a licensed list for positions, when applicants from licensed lists did not meet our standards.

4. I, and the other duly appointed members of Local Board #2, placed great emphasis on human qualities in selecting a principal. We of course believed that education qualifications of a high order and experience in schools are crucial. But beyond this, a principal must be cognizant of the special problems of the community in which his school is located, must be sensitive to the best means of handling those problems, and must be able to deal effectively with the children, teachers and parents at the school. He should be concerned with the training of his teaching staff and should in all respects consider him-

self the educational leader of his school -- not merely its chief administrator.

5. Subsequent to the statutory modification permitting us wider latitude in personnel selection, there arose several openings for principals in our district. My general impression, based on interviewing a range of licensed and unlicensed persons, is that the possession of a license is not necessarily proof of a person's qualifications for the job. With respect to all but two of these vacancies, we were able to find licensed candidates who also possessed the human qualifications which are so important, and we were pleased to appoint licensed principals to fill these vacancies. In the other two cases, however, the licensed applicants did not possess the necessary qualifications for the particular school involved.

6. The deficiencies of the licensed applicants for these two positions of course varied from person to person. In general, however, we found them to lack comprehension of local problems or their possible solutions. Moreover, the licensed applicants were unduly inflexible in their approach to educational problems. They tended to give stock answers to complex problems rather than offer imaginative solutions to meet the particular situation at hand.

7. The two schools for which we were unable to make an appointment from among the licensed applicants were P.S. 168 and P.S. 59. In each case we advertised the opening for many months and willingly interviewed all persons on the licensed list who made applications.

(a) In the case of P.S. 168 located at 316 East 105th Street, the opening had existed for about two years. P.S. 168 is part of the MES (More Effective Schools) program designed to improve the educational experience in disadvantaged areas and we are particularly concerned with obtaining the best leadership for that school. We interviewed seven licensed applicants, none of whom had experience in MES schools and none of whom, in our opinion, met the needs of the school in other respects. On the basis of outside recommendation we also solicited the application of an assistant principal at a nearby MES school who is not licensed as a principal. This individual was interviewed, as were the licensed applicants, by a committee consisting of Local Board members, and parents and teachers of P.S. 168. The general consensus of the committee members was that of all candidates considered, this individual's background and experience, and his understanding of the problems of the school, rendered him more qualified than the other candidates interviewed. At that point Local Board #2 considered offering the position to him but no formal action was taken because of pending litigation affecting our right to make such an appointment at that time. The term of the Local Board then expired, leaving the position vacant. The school is not under the jurisdiction of Community Board #2.

(b) In the case of P.S. 59 located at 228 East 57th Street, the opening had existed for about three years. This school is not in a disadvantaged area and attracted more applicants. We interviewed twelve licensed persons, none of whom

were satisfactory. The present acting principal, who is not licensed as a principal, was considered by the Local Board and parents of P.S. 59 to be more qualified than any of the licensed candidates to be head of that school. During this three-year tenure as acting principal, he has performed in a superior manner. P.S. 59 is within the jurisdiction of Community Board #2, which has retained this individual as acting principal.

8. On the basis of my experience as a school board member, it is my considered judgment that the holding of a license granted under the existing procedures is not a true test of the qualifications of supervisory personnel and prevents Community School Boards from selecting the most qualified persons for particular positions.

PETER ... STRAUSS

Signed and sworn before me
this 22nd day of September, 1970

Edward D. Moldover
Notary Public

EDWARD D. MOLDOVER
Attorney and Counselor at L
State of New York No. 31 2741
Qualified in New York C...
Commission Expires March ...

Affidavit of Edwin J. Haas verified on
September 22, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al., Plaintiffs,	:	CIVIL ACTION No. 70 Civ. 4141
v.	:	
BOARD OF EXAMINERS, et al., Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

DR. EDWIN J. HAAS, being duly sworn, deposes and says:

1. I am Acting Community Superintendent of District #6 in Manhattan. Previously, from November 1, 1968 to July 1, 1970, I was District Superintendent of the Former District 6 Local School Board.

2. As Superintendent, my responsibilities have included advising Local School Board #6 regarding the selection and appointment of supervisory personnel for all schools and programs within said district.

3. District #6 had jurisdiction over 20 elementary schools and 5 middle schools (one I.S. and 4 junior high). The student population in the public schools in District #6 is approximately

59% black, 31% Spanish-speaking and 10% white.

4. District #6 had approximately 8 vacancies for the position of principal of an elementary or junior high school over the past two years.

5. I worked with the Local School Board and the Parents Associations of the schools involved to find the best available candidates for those positions. We had in each case followed the established procedures in first soliciting applications from persons on the appropriate supervisory lists. However, in most cases we were unable to find applicants from said lists who were qualified for the particular principalship positions in question. Instead, in order to obtain the persons most qualified for said positions we were forced to select persons not on the prescribed lists and appoint them as acting principals. Thus for example, we had a vacancy for the position of principal at P.S. 192. We first considered the three persons who applied from the principal's list and selected one who later declined our offer. We subsequently searched for the best person available for this position. Mr. Alejandro Rodriquez appeared to the Parents Association of P.S. 192 and to the Local School Board to be the best available candidate. He has a State Certificate as Principal; he was an intern in the Fordham University Internship Program for Urban School Principals and Administrators; he has been an acting assistant principal for 1½ years; he had administered a cluster of schools in a heavily Negro and Spanish-speaking section of District #6 for a number of months; he is of Puerto Rican descent. We feel he is uniquely qualified to serve as principal of P.S. 192. However, he does not have a New York City principal's license. The fact that he does not have such

a license is, in our opinion, of no relevance to his capacity to perform as principal of P.S. 192. Therefore we appointed him as acting principal of P.S. 192 on April 30, [illegible].

6. It has been our experience that there are persons on the supervisory lists with excellent qualifications. But it has also been our experience that persons not on such lists often have equally good qualifications and in many instances appear to be the most qualified candidates for particular positions. In sum, we have found that, in looking for people to fill particular supervisory positions, the fact a candidate appears on a prescribed supervisory list is of no particular relevance to his capacity to perform the position he is thereby legally eligible for.

7. In my opinion, the reasons that the supervisory lists do not provide in many cases candidates qualified for the supervisory positions we have had to fill include the following:

(a) The specific abilities and qualifications required for particular positions depend in large part on characteristics of the particular school area and district. The examinations conducted by the Board of Examiners take no account of the varied needs of different kinds of schools and localities. A list consisting of a highly limited number of people who have passed such an examination in many cases simply contains no candidates with the particular qualifications required for a particular position.

(b) The lists contain virtually no black and Spanish-speaking persons although in my opinion some such persons are needed in leadership positions in a district such as ours, and there is no reason to believe that black and Spanish-speaking persons as a group do not have the necessary qualifications to

serve as supervisors in the New York School System.

(c) In my opinion and from my experience the supervisory examinations conducted in the past test for certain abilities and capacities which appear wholly unrelated to the qualities necessary in a good supervisor. Moreover, the examinations are in many respects culturally biased in that they test for abilities and capacities which -- although unrelated to the capacity to perform as a supervisor -- are far more likely to be possessed by persons from white, middle-class backgrounds than by black and Spanish-speaking persons. Thus, for example, the examinations typically contain substantial sections which test familiarity with a certain kind of cultural background which blacks and Spanish-speaking persons have not for the most part had. In my opinion, success on such questions has no relevance to a person's leadership capacity. Since no comparable questions are asked relating to black and Spanish-speaking people's background, the tests have a built-in bias.

(d) Numerous aspects of the procedure by which the supervisory examinations are given have tended to lock out black and Spanish-speaking persons from taking and passing said examinations. For example: (1) The substantial coaching course fee ($500-$600) charged in the past,* coupled with a feeling that they will not be given a fair chance, discourages applications; (2) Black and Spanish-speaking

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* Now the Board of Education gives such courses free of charge. This is an improvement.

persons are virtually unrepresented among the assistant examiners who conduct the examinations and administer the subjective oral interview and observation aspects. This latter is of particular importance since these are almost the only aspects of the examinations which purport to test for leadership qualities.

8. In my opinion it would be possible to design examinations which would in fact test for qualities relevant to job performance. However, in the absence of such examinations, I believe that Community School Boards would be best enabled to select the most qualified persons for available supervisory positions if they were free to appoint any person who possessed the requisite State certification for the position in question.

Edwin J. Haas

Edwin J. Haas

Signed and sworn before me
this 17 day of September 1970

Herbert Holland

Notary Public

HERBERT HOLLAND
Notary Public, State of New York
No. 41-1035835
Qualified in Rockland County
Commission Expires March 30, 1971

Affidavit of Edythe J. Gaines verified on
September 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al., Plaintiffs,	:	CIVIL ACTION No. Civ.
v.	:	
BOARD OF EXAMINERS, et al., Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) SS.:
COUNTY OF BRONX)

EDYTHE J. GAINES, being duly sworn deposes and says:

1. My name is Edythe J. Gaines and I am Community Superintendent for School District 12 of the New York City Public School system. My office is located at 708 East Tremont Avenue, Bronx, New York.

2. I have been an employee of the Board of Education of the City of New York for twenty-five years, beginning in September 1945. During that period I have served as a classroom teacher for seven years (1945-1952), a core curriculum coordinator for the Junior High School division for three years (1952-1955), an assistant principal for five years (1955-1966), a junior high school principal for seven years (1960-1967), a district

superintendent for three years (1967-1970), and have just been elected to a four-year term as a Community Superintendent (July 1970).

3. With the exception of the superintendentship I have acceded to each position as a result of passing examinations administered by the Board of Examiners. Also, both as assistant principal and as principal I served as an assistant examiner for the Board of Examiners. I participated in administering oral interview examinations and field tests for teachers. Thus, I have experienced being subject to those examinations procedures as well as directly participating in carrying out such procedures.

4. I believe that the testing procedures of the Board of Examiners are such that blacks and Puerto Ricans feel discouraged from even applying to take such tests. What I offer is speculation based on long experience. People just do not flock to what they perceive to be a closed system. The feeling is that only the more courageous among minority group persons can "break in." This feeling becomes a powerful deterrent to the professional who perceives himself as competent but not as "a giant." A related factor is that traditionally few blacks and Puerto Ricans have had the experience requirements to take supervisory examinations. For example, five years of experience under the regular teaching license used to be required. Such a license could only be secured by passing a Board of Examiners test. For this reason too many blacks and Puerto Ricans served long years under substitute licenses and therefore do not have the required five years under the regular license. Again the perceptual problem had an effect. Such persons felt that the regular examination would be too difficult, that through direct

means or indirect ones they would ultimately be failed, that they would be permitted to pass the substitute examination but would not be permitted to pass the regular one.

5. Much of the fear among blacks and Puerto Ricans centered on those Board of Examiners' tests in which the candidate could not be anonymous - that is, the oral interview, the field or practical test and the physical examination. They felt that if they could get through the written parts of the examination they would be "knocked down" on one or more of the other parts. Especial concern existed about the speech examination which at one time was a spearate examination and which continues as part of the oral interview. Regionalisms in speech, especially "southernisms," that is, speech that sounds in any way "Negro" were the cause of countless failures. The first black principal of a New York City public school (Mrs. Ayres) relates how she was failed on her first try on the basis that she had "southernisms" in her speech although she was born, raised and educated totally in New York City. Stories of this kind abound among black and Puerto Ricans.

6. To my knowledge there is no evidence at all to prove or even to suggest that supervisory examination do indeed select candidates who have skills and abilities needed for the job. There is no evidence to show that candidates who were failed were unable to do the job. Indeed there is much informal evidence to show that there is zero correlation between the examination and capability at the job. Here, I have reference to the fact that people in "acting" capacities have taken the examination. Other professionals can cite examples of people who have served

with distinction in an acting capacity but failed the examination not once but several times. Other professionals can cite examples of candidates who come out "at the top of the list" but who are virtual incompetents on the job. The standing game among examination takers is to list test items that are most irrelevant to the job. I remember that at the examination I took for the principalship of a junior high school, I was asked to identify various types of saws used in woodwork and to show that I knew what a notch was in sewing.

7. To my knowledge there has been no validation of Board of Examiners tests at all. The best that can be said for the examination is that they are composed by members of the profession who serve in the capacity for which the candidate is to be examined. That lends at least the possibility of some functional validity to the examination. However, no test expert would suggest that that was enough to validate a test.

Edythe J. Gaines

Signed and sworn before me
this 23rd day of Sept., 1970.

Marjorie H. Doswell
Notary Public

MARJORIE H. DOSWELL
NOTARY PUBLIC, State of New York
No. 03-6[illegible]500
Qualified in Nassau County
Commission Expires March 30, 1972

Affidavit in Support of Motion of Richard S. Barrett verified on October 15, 1970 and submitted on October 20, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al.,		
Plaintiffs,	:	CIVIL ACTION
v.	:	No.
BOARD OF EXAMINERS, et al.,	:	70 Civ. 4141
Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

DR. RICHARD S. BARRETT, being first duly sworn, deposes and says:

1. I live at Five Riverview Place, Hastings-on-Hudson, New York. I am Research Director of the School Division of the Center for Urban Education, 105 Madison Avenue, New York City.* I received a B.S. in Administrative Engineering from Cornell in 1948, an M.A.(Ed) from Syracuse in 1952, and a Ph.D. in Industrial Psychology from Western Reserve University (now Case-Western Reserve).

2. I was principal investigator of a study sponsored by the Ford Foundation which resulted in the book: Kirkpatrick, J.J.

* The views expressed in this affidavit are my own and do not necessarily represent the position of the Center for Urban Education

Ewen, R.B.; Barrett, R.S.; and Katzell, R.A., Testing and Fair Employment, New York University Press, 1968; I have consulted on employment testing with, among others, United States Air Force, Standard Oil (New Jersey), Lever Brothers, and Equitable Life Insurance Society.

3. I have examined the previously administered examinations for supervisory positions in the New York City school system listed below ~~and attached as Exhibits 1-6~~:

(1) Principal, Day Elementary School, March 30, 1964

(2) Assistant Principal, Junior High School, September 3, 1968

(3) Principal, Day High School, March 29, 1968

(4) Principal, Day Elementary School (men and women), April 3 & 4, 1961

(5) Assistant to Principal, Day High School (Administration) December 29, 1969

(6) Assistant to Principal, Day Elementary Schools, April 22 & 22, 1965

I have given particular attention to the Examination for License as Principal of a Day Elementary School, given March 30, 1964, and Examination for License as Assistant Principal in Junior High School, given September 3, 1968. I have formed the opinion that these tests are likely to discriminate unfairly against candidates for licensed supervisory positions who come from ethnic minority groups, particularly Negro or Spanish-speaking. In the absence of validation data, it is impossible to determine that the tests do in fact discriminate unfairly. My judgment can only be based on examination of the tests and other documents. The reasons for the

opinion that the tests are likely to discriminate unfairly are set forth below.

4. Content analysis of the tests discloses their highly esoteric nature. For example, the test for Assistant Principal, Junior High School asks for the definitions of such words as sumptuary, congeries, beadle, plethoric and recension. Other questions range wide over weather, the Taft-Hartley Act, aqua regia, geology, etc. Such general intelligence and informational tests are commonly used for predicting school grades. Their validity for selection of supervisory personnel can be determined by a validation study, but cannot be guaranteed in any other way. Some of the essay questions on this examination and on the 1964 examination for principal, day elementary school, present problems which appear to be related directly to school practice, and their inclusion might be justified on the grounds that they have content validity, that is, they might constitute a valid work sample. If they have content validity, they have the kind of inherent validity that a good typing test has for a typing job. However, for a test at this level to be justified on the basis of content validity, it is necessary that the job be analysed, good and poor performance defined, questions relevant to significant aspects of the job prepared, level of acceptability of answers defined, and test scorers trained and supervised. Statistics on the reliability of the scores given by two different scorers and the difficulty of the items must give satisfactory results. In the absence of these steps, a claim of content validity is not justified.

5. It has been widely documented that ethnic minority groups, especially Negro and Spanish-speaking, score lower on t average on tests in general, including the kinds of tests described above, than whites whose native language is English, but that lower test scores do not necessarily mean poorer job performance. Further, Spanish-speaking candidates are likely to be handicapped by vocabulary items. A test cut-off score will, in all probability, eliminate a substantially larger proportion of Negroes and Spanish-speaking candidates than whites whose native language is English, in the typical selection situation. If it does not also eliminate a higher proportion of potential failures than is found in the accepted group, it is discriminating unfairly.

6. The tests have a passing score of 60 percent (with some exceptions). This standard is arbitrary, since a score of 60 percent can be very easy or very difficult to attain, depending on the character of the items. Being arbitrary, and having the potential for wide variability, the test standards cannot be accepted as being reasonable without an empirical check to determine what level of test score is required for acceptable performance.

7. Basic to the use of all selection procedures is the need to fit them to the particular job for which the candidate is applying; otherwise inappropriate tests or other measures may be applied. An informed layman knows that the work of a principal or other supervisor varies not only with the level of school, but also the socio-economic and ethnic make-up of the student body, the size and age of the facility, the character of the

local community, and other conditions. To expect any single test to be equally valid for job settings that differ so widely is to expect the impossible.

8. It is not unreasonable, however, to demand validity from a selection procedure for positions of the level of supervisor in a major school system. Many private employers, such as the American Telephone and Telegraph Company, have established assessment centers where valid predictions are made regarding success on a wide variety of executive positions. These selection procedures make little use of the type of questions typical of the supervisory tests I examined for purposes of this affidavit.

9. Section 2569 subd. 1 of the New York Education Law states in part:

> . . . The Board [of Examiners] shall periodically review the validity and reliability of examinations as well as examination procedures.

In my opinion, based on the tests I have examined (listed in Paragraph 3, supra) and the complaint, motion for preliminary injunction and supporting memorandum filed by plaintiffs in the instant action, the tests administered by the Board of Examiners have not been shown to be valid, reliable or fair; and it is likely that an empirical examination would show that they discriminate on the basis of race or ethnic status without any rational justification in terms of selecting the best-qualified persons for supervisory positions in the New York City school system.

Richard S. Barrett
RICHARD S. BARRETT

Sworn to before me this
15th day of October, 1970

Notary Public

NORMAN MANIT
Notary Public, State of New York
No. 31-2509750
Qualified in New York County
Commission Expires March 30, 1971

AFFIDAVITS IN OPPOSITION TO MOTION SUBMITTED ON OCTOBER 27, 1970

Affidavit of Gertrude E. Unser verified on
October 26, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al., Plaintiffs, v. BOARD OF EXAMINERS, et al., Defendants.	Civil Action No. 70 Civ. 4141 AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF ~~NEW YORK~~ Kings)

GERTRUDE E. UNSER, being duly sworn, deposes and says:

1. I am Chairman of the Board of Examiners of the Board of Education of the City of New York, and one of the defendants herein and submit this affidavit in opposition to plaintiffs' motion for a preliminary injunction.

2. Each year thousands of successful applicants receive licenses as teachers and supervisors in the New York City schools. They are needed to fill newly created positions, to replace teachers and supervisors who retire or die in service and to replace those who resign to take positions elsewhere. The licensing of teachers and supervisors is controlled by state law which, while undergoing numerous amendments, goes back over 70 years.

3. Article V, Section 6 of the New York State Constitution provides in relevant part:

> "Appointments and promotions in the civil service of the state, and all of the civil subdivisions thereof . . .

> shall be made according to merit and fitness to be ascertained, as far as practicable, by examination . . ."

In order to insure the carrying out of the constitutional mandate, Section 2569 of the New York Education Law provides for a Board of Examiners in cities having a population of one million or more* which is charged with the duty

> "to hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools in such city, except examiners, and to prepare all necessary eligible lists, subject to the responsibilities among the members of the board of examiners hereinafter set forth. The board shall periodically review the validity and reliability of examinations as well as examination procedures. It shall hear and determine such appeals as may be authorized by it. It shall perform such other duties as the board of education and the chancellor of said city school district may require."

4. Article V, Section 6 was enacted in 1894 in the spirit of reform which followed the enactment of the Pendleton Act in 1883. New York was leading the way for states by pursuing the federal government's introduction of the application of civil service to public

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*Contrary to plaintiffs' allegations New York City is not the only city to hold examinations for licensing teachers and supervisors. §2573 Subd 10-c of the Education Law provides in part:

"In a city having a population of four hundred thousand and less than one million it shall be the duty of the Superintendent of Schools, at the direction of the board of education, to hold examinations whenever necessary, to examine all applicants who are required to have their names placed upon eligible lists for appointment in the schools of such cities and to prepare all necessary eligible lists. . . ."

The City of Buffalo falls within this provision.

employment. It was the same state legislature which in 1898 established the City of Greater New York and the consolidated Board of Education which also provided legislation creating a Board of Examiners to "hold such examinations as the city superintendent shall prescribe and shall prepare all the necessary eligible lists." In 1923 the then Superintendent of Schools, William Ettinger, wrote that the creation of the Board of Examiners "was designed to do away with the abuses, real or supposed, arising from the appointment and promotion of teachers in the several parts of the city on a basis of social and religious favoritism and of political patronage, and to place the appointment and promotion of teachers purely on a competitive basis of merit."

5. The Board of Examiners is composed of five members including the chancellor of the school system or his deputy. Four members are chosen through open competitive examination by the New York City Department of Personnel under regulations set by the State Commissioner of Education. It is widely acknowledged that this examination is perhaps the most difficult given anywhere for any public position.

Admission to the examination is permitted only after searching requirements have been met. These include two years of graduate study with courses in administration, research, school finance, education law, and personnel administration and eight years of teaching and supervision in a "capacity involving a high degree of responsibility and of a character to fit the candidate to carry out the duties of the position." In the most recent examination,

of 108 who applied from all over the United States, only five were successful.

It is apparent that the Board of Examiners is a highly select group with broad professional background in education and related fields chosen through the most objective and impartially searching examination given under civil service.

6. In furtherance of the constitutional directive that positions be filled on the basis of "merit and fitness" and subject to the provisions of the Education Law and the By-Laws of the Board of Education, it is the duty of the Board of Examiners to hold examinations for teaching, administrative, supervisory and other licenses and prepare appropriate eligibility lists for appointment to the public schools of the City of New York. The need for examinations is determined by the chancellor and the Board of Education sets eligibility requirements through its By-Laws.

7. The Board conducts examinations for over 1,200 licenses and certificates of competency. There are approximately 4,000 supervisory positions alone in the school system, which positions pay approximately $20,000 to $32,000 per year. The position of elementary school principal pays approximately $25,000, which amount is also paid to persons holding the position of acting principal. Plaintiffs Chance and Mercado hold such positions.

dated Oct. 19, 1965; In the matter of Arbie W. Simpson, Decision No. 5122 March 30, 1970; In the matter of Irving J. Gold and George Cohen, Decision No. 5142, dated June 12, 1970, all attached as Exhibit 1 a) b) c)

45a

8. Commissioner of Education Nyquist has ruled that persons who hold a position in an acting capacity for not less than three years shall be deemed to have tenure in such position. See citations at top of page Clearly, if plaintiffs Mercado and Chance could delay the scheduling of examinations sufficiently, they would be in a position to claim tenure as principals.

9. The duties of the Board of Examiners as set forth in Section 2569 of the Education Law are detailed in Section 1 of the By-Laws of the Board of Examiners. A copy of such By-Laws is annexed hereto and marked Exhibit "A". In brief outline, the activities of the Board of Examiners in conducting a test are as follows:

(a) The Board of Examiners determines the scope and form of the tests to be used. The scope depends upon the nature of the duties of the position as described by the Superintendent. It may include objective-type and essay-type written tests, an interview test, a teaching test, a conference test, an inspection test, a medical examination, and an evaluation of training and experience. See Examination Regulations attached as Exhibit B.

(b) In line with a cardinal principle of the merit system, it announces all examinations, publishes the qualifications and scopes, and invites all interested applicants to apply without restriction.

(c) As another necessary part of a merit system, the examiners insure that all applicants are treated with confidentiality and take all precautions with respect to security such as anonymity of rating.

(d) The Board of Examiners selects, trains and supervises assistant examiners chosen from the teaching and supervisory staff of New York City and other cities throughout the nation as well as from colleges, universities and appropriate social agencies. The most experienced experts in the field are actively sought out to help plan and administer all parts of the examination.

(e) Giving the examination is not enough. Every candidate, under the merit system, has the right to procedures which are reviewable and which are amply documented. He has the right to know why he has been rejected, including the right to be provided with a set of reasons for failure.

(f) Finally, the failing applicant has the right to take appropriate action to get relief. He may appeal to the examiners for rerating or reconsideration of any and all parts of the examination. These appeals are considered by a committee of examiners who were not involved in any way in the conduct of the examination the candidate has failed. If he is still dissatisfied, the failing applicant may appeal to the State Commissioner or seek relief in the courts.

10. The relationship between the Board of Examiners and the Board of Education has been the subject of several determinations by the Courts of this State and the Commissioner of Education of the State of New York.* It has consistently been held that in determinations of

*Matter of the Jurisdiction of the Board of Examiners of the City School District of New York and the supervision and control of teachers' examinations, State Department Reports , (1922): Matter of the Investigation of the Board of Examiners of the City of New York by the President of the Board of Education of such city as a Committee of one appointed by said Board. State Department Reports (1926). Attached as Exhibit # 2, and 2a.

the scope of examinations, the preparation of examination materials, the selection of tests, and the determination of pass marks, the Board of Examiners acts as an independent and statutory body subject only to the jurisdiction of the Commissioner of Education and the courts.

11. With respect to the nature and type of licenses and with respect to the educational and experience requirements for licensure the Board of Education has sole jurisdiction.*

12. The specific duties of the respective positions established by the Board of Education are set forth by the Superintendent of Schools. The Board of Examiners develops the content of examinations in consonance with the duties of the position as established by the Superintendent of Schools. For example, if the Board of Education and the Superintendent of Schools stress the duties of community relationships for principals, the Board of Examiners would give great weight to this aspect in the examination process.

13. Examinations are announced by the Board of Examiners at the request of the Superintendent of Schools. Pursuant to such a request, an examination for license as principal of day elementary schools was announced on September 11, 1970. It was requested by the then Acting Superintendent of Schools, Mr. Irving Anker, with the recommendation that the examination be completed, if possible, by February 1, 1971, or at the latest in the spring of 1971.

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*Under the new Decentralization Law effective July 1, 1970 these powers are vested in the Chancellor. §2570 J.

14. The eligibility requirements, the scope of the examination and other relevant data are set forth in an Examination Announcement, dated September 11, 1970, a copy of which is annexed and marked Exhibit "3". Appended to and part of this announcement is a statement of the duties of the position of principal of a day elementary school as set forth by the Superintendent of Schools and submitted to the Board of Examiners as a guide in determining the scope of the examination, the nature of the tests to be administered and the content of the tests.

15. The final date for filing applications for this examination is October 7, 1970. The written test of the examination is scheduled for November 3, 1970, a national holiday.* It is the announced intention of the Board of Examiners and the office of Teacher Personnel of the Board of Education to conduct written, interview and medical tests in this examination at a site in Puerto Rico, as well as in New York City, in order to make it possible for eligible residents in that area to take the examination.

16. It is anticipated that more than 2,000 persons are eligible and will be applicants for the examination. Included among the estimated 2,000 applicants expected to file, are 1,437 participants in the Professional Promotional Seminars conducted by the Board of Education. These seminars were established several years ago by the

*Examinations are scheduled for such dates in order not to conflict with normal business of the schools, Saturdays or other religious holidays, etc.

Deputy Superintendent for Personnel upon the recommendation of the Board of Examiners in order to provide free assistance in developing individual competence in supervision and administration with a view towards completing successfully the various tests in examinations for supervisory licenses.

17. The seminars for preparation for the examination for license as principal of day elementary schools were begun in the spring of 1970, continued during the summer and are now still in progress. They are conducted in seven centers, six of which are located in low socio-economic areas, such as South Jamaica, South Bronx and the Bedford-Stuyvesant section of Brooklyn. These sites were selected in order to encourage minority group participation.

18. The project director of the Board of Education seminars has stated to the deputy superintendent of teacher personnel that among the 1,437 persons now participating in the seminars in the various centers, approximately 330 are identified as black and Puerto Rican.

19. In addition to this examination, many other supervisory examinations have been conducted, are being conducted and are projected by the Board of Examiners. See examination schedule attached as Exhibit 4.

20. Plaintiffs seek to enjoin the giving of all of the foregoing examinations yet they have not shown that they would be harmed in any way if the examinations continued as scheduled. By their own statements,

plaintiffs appear to be eligible for the instant examination and indeed have filed to take the examination. If they pass, they will be placed on an eligible list for appointment to the position of principal of day elementary school. If they fail and contend that such failure was the result of discriminatory examination procedure, they haye ample relief through the appeal proceedings of the Board of Examiners, the Commissioner of Education, the State Commission on Human Rights, the New York City Human Rights Commission and the Courts of the State of New York. Certainly they cannot claim to be aggrieved until they can contend that they have failed and that such failure was the result of discriminatory examination procedures.

21. While an injunction is not required to protect the interests of plaintiffs, enjoining the Board of Examiners as requested by plaintiffs would result in severe disruption of the entire education process in the City of New York. The present eligibility list for elementary day school principal has been exhausted. Over 2,000 candidates have applied to take the principals exam. To prevent them from doing so would injure the school system and the children attending the schools in that it would deprive those schools of appropriate leadership in supervision, in administration, curriculum direction, and relationship with parents and the community. Plaintiffs suggest that persons could be assigned in acting capacities to fill the void. However, it is self-evident that an acting principal or other acting supervisor is not

in a position to act with the continuity, authority and assurance that come with appointment to a position and the resulting tenure in office. Further in view of the extreme difficulties faced by our schools, school boards, students, parents, teachers and administrators in a period in which we are moving from a centralized school system to one which will be decentralized, the availability of licensed and qualified personnel for immediate placement in schools is essential.

22. Additionally, the Education Law, Section 2569, requires that the defendant Board of Examiners hold examinations whenever necessary, examine all applicants who are required to be licensed or to have their names placed on eligible lists for appointment, and to prepare all necessary eligible lists. Should a preliminary injunction issue in the instant case, the result would be that the Board of Examiners would be prevented from performing the duties imposed upon it by law and requested of it by the Board of Education and by the Chancellor.

23. The critical importance of holding examinations as scheduled is emphasized by the following additional considerations:

(a) The State Education Law requires that vacancies in the public school system of New York City be filled within six months. Since a large number of vacancies in supervisory posts are anticipated as a result of expected retirement, postponement of the instant examination would result in violation of State Law.

(b) As a result of the liberalized pension benefits granted by the legislature in 1969 it is anticipated that more than 50% of the present supervisory staff will have retired within the next four years. Many of those will have retired within the next year or two. This explains the concern of the Acting Superintendent of Schools for the promulgation of a list of principals in day elementary schools not later than the spring of 1971. It would be an unnecessary hardship to postpone the announced examination as well as for other supervisory examinations when the need is pressing now and will become much more acute within a short time.

(c) This examination has already been cancelled once. It was originally announced on August 28, 1969 and was then cancelled at the request of the Superintendent of Schools in order that the requirements for eligibility for the position be reviewed with a view towards liberalization.* This examination was cancelled by the Superintendent of Schools two weeks prior to the conduct of the written test resulting in outraged protest from 1,300 individuals who had filed in good faith and had made preparation. To cancel the same examination a second time under similar circumstances would indeed do irreparable damage to all prospective applicants.

(d) In addition to and including the prospective applicants who prepared themselves for this examination through professional seminars are those prospective applicants who in good faith undertook to make themselves

*This liberalization was effectuated for the express purpose of including more teachers representing minority groups within the eligibility requirements for the examination.

eligible and qualified by taking appropriate courses and training in various colleges and universities with considerable expenditure of time and money. Such preparation may be vitiated as a result of the postponement of the instant examination.

(e) Those applicants for other supervisory examinations who are awaiting the promulgation of eligible lists or appointment from existing eligible lists to vacancies would suffer irreparable injury in loss of salary, pension and seniority rights.

24. The content of the written test for the examination scheduled to be given on November 3, 1970, which is in the final stages of preparation, like all examinations given by the Board of Examiners for supervisory positions is entirely relevant to the duties of the position as established by the Chancellor and as set forth in the by-laws of the Board of Education and as they appear in the examination announcement circular (Exhibit "3"). Such examination is in no way discriminatory towards blacks or Puerto Ricans. In view of the accelerated rate of blacks and Puerto Ricans entering in the school system and in view of estimates by the Division of Personnel, it is likely that substantial numbers of blacks and Puerto Ricans will take the examination and be successful.

Gertrude E. Unser

Sworn to before me this
26th day of October, 1970.

Mary M. Cuccia
Notary Public

Commissioner of Deeds, City of New York
Kings County Clerk - No. 2-551

Affidavit of Murray Rockowitz verified on
October 26, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LUIS C. MERCADO, et al.,

Plaintiffs,

-against-

BOARD OF EXAMINERS, et al.,

Defendants.

Civ. No.4141
Index No. 70

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF ~~NEW YORK~~ Kings)

MURRAY ROCKOWITZ, being duly sworn, deposes and says:

1. I am a member of the Board of Examiners of the Board of Education of the City of New York, and one of the defendants herein and submit this affidavit in opposition to plaintiffs' motion for a preliminary injunction.

2. I became a member of the Board of Examiners in 1966. However, I have been part of the New York City school system since 1939, holding a great variety of licenses beginning with that of teacher and including assistant principal of a junior high school, chairman of a high school English Department, principal of an elementary school, principal of a junior high school, and principal of an academic high school.

3. I hold a B.A. degree from C.C.N.Y.; M.A., New York University; M.S. in Education, C.C.N.Y. and Ph.D. in Educational Administration and Supervision, N.Y.U.

4. As a member of the Board of Examiners, my primary responsibility is as Examiner in Charge of Research and Development. This function includes the responsibility for conducting reviews of the validity and reliability of the tests given by the Board of Examiners and a review of the administrative procedures involved in the conduct of such tests. Additionally, I consult with the units of the Board of Examiners which conduct examinations in such fields as foreign languages, music, art, health and physical education, guidance, social work, psychology, special education and psychiatry, among others. In the course of fulfilling the foregoing responsibilities, I have become familiar with all aspects of the Board of Examiners' testing activities.

OBJECTIVITY OF EXAMINATIONS

5. The plaintiffs in this action have alleged that "The testing procedures of defendant Board of Examiners, being neither objective nor being measurements of

merit and fitness for the particular jobs involved, and yet being a basis for promotion in the civil service, are conducted in violation of Article V §6 of the New York State Constitution and §2590-j 3(a)(1) of the New York Education Law." This allegation is totally without merit and lacks even the slightest foundation in fact. In point of fact, the testing procedures of the Board of Examiners are clearly objective measurements of merit and fitness for the jobs involved. The term "objectivity" has been defined as "a means of measuring individual differences in behaviour that eliminates, as far as possible, the influence of the examiner's bias or opinion." English and English, A Comprehensive Dictionary of Psychological and Psychoanalytical Terms. (Longmans, Green and Co. New York, 1958)

6. The procedures used by the Board clearly meet the aforesaid definition.

(a) Applicants cannot be identified by the test scorer. The identity of the applicant can only be determined by reference to a code book which is punched on his papers. The test scorer does not have access to the code.

(b) Answer papers are not only anonymous but they are machine scored.

(c) Questions for a single test are submitted by a number of experts on a number of topics to eliminate any individual bias that might exist.

(d) Essay questions are rated by different committees so that no one individual is responsible for the rating of an entire examination.

(e) Detailed, objective rating guidance are prepared for the rating of each question. These guides are extremely detailed in order to eliminate, insofar as possible, the chance of individual bias. (Sample attached as Exhibit 1. Standard Answer and Rating Directions attached as Exhibit 1 a.)

(f) On interview tests for supervisory positions, panels of three experts are generally used to provide for a pooling of judgment. (Interview Test Guideline attached as Exhibit 1 b.)

7. The judgment of the Board of Examiners that its testing procedures is eminently objective has been confirmed by numerous experts in the testing field. Professor Robert L. Thorndike of Teachers College, Columbia University, perhaps the most renowned authority on the subject in the country, has said with regard to the objectivity of the Board's procedures:

> "Such procedures as never identifying the examinee by name on a test paper, providing the reader of the paper with a scoring guide indicating the kinds of issues to be dealt with and the credits to be allocated to each (and so forth - sic) [insofar as] possible, and these precautions appear to have been systematically and scrupulously observed by the Board of Examiners in their testing procedures. Though the assessment procedures cannot claim to be fully objective in the sense that any observer and/or reader would automatically arrive at the same score or the same evaluation of the person being observed, they are

> objective and they are impartial in the sense that the scorer of a test paper is responding only to the answer provided to the question, and that the interviewer in an interview situation is responding only to a person who is not known to him. ... Within the limits of the possible, the Board of Examiners appears to have made a conscientious effort to make sure that partiality and partisanship do not enter into the evaluation of the responses to the tasks that they have set the examiners." (Affidavit of Professor Robert L. Thorndike, attached as Exhibit 2(a))

Similarly, other eminent experts in the testing field have reviewed the Board's procedures and examinations and have concluded that such procedures and examinations are objective. (Affidavits of Professor Marvin Sontag, Columbia University, attached as Exhibit 2(b); Professor Aaron Suss Carton, State University of New York at Stony Brook, attached as Exhibit 2(c); and Professor Esin Kaya Carton, attached as Exhibit 2(d)).

VALIDITY AND RELIABILITY OF EXAMINATION

8. The plaintiffs allege "The testing procedures do not indicate a candidate's ability to do the job being tested dor (sic). There is no evidence that they measure merit or fitness, they have never been validated, and they are unreliable psychological instruments." (Paragraph 23, Amended Complaint.) These allegations are totally unsupported by fact and are outrageous false assertions in view of the Board's intense efforts to insure the relevance and validity of its examinations.

9. While prior to 1967 the law did not specifically

include a requirement concerning "validity and reliability," the Board of Examiners has for many years consistently conducted such reviews.

10. The concept of "validity" as it applies to examinations is susceptible to more than one definition. The plaintiffs, in its brief, asserts that the test of validity is "one that tends to predict job performance." (Plaintiffs' Memo, page 7.) Such a validation standard might be applicable if the tests given by the Board of Examiners were aptitude tests, i.e., a test designed to determine the potential of the individual for training and for developing the knowledge and skills for a particular job. In point of fact, the Board of Examiners gives tests to determine the applicant's ability to perform and not his aptitude to learn. Accordingly, the so-called "predictive validity" tests suggested by plaintiff are inappropriate for the work of the Board. The Board seeks to validate its tests by matching the knowledges and skills it examines to the duties of the position being sought.

11. In addition to research concerning validity, the Board insures the validity of its tests by the methods it has devised to make the tests relevant to the duties of the position. For each examination, the Board of Examiners obtains from the Board of Education detailed analysis of the job in question. These are called the "duties of the position." (Same attached as Exhibit 3) A committee of experts is assembled to select the most significant duties

(job responsibilities) of the position to be tested for. Well known interested lay persons may be consulted for their advice on the qualities being tested for in a particular test. Thus, for the Elementary School Principals examination in question a committee was assembled last December 12, 1969 attended by:

Dr. Aaron Brown, Professor of Education, Long Island University.

Dr. Richard Campbell, Director of Personnel Research, American Telephone & Telegraph Company.

Dr. Eugene Maleska, Associate Director, Center for Urban Education.

Mr. Martin Mayer, Author; Chairman, Local School Board No. 2, 1962-67.

Professor Priscilla Pemberton, Bank Street College.

Dr. Herbert Schueler, President, Richmond College.

Peter J. Strauss, Esq., Attorney, Member, Local School Board No. 2.

Mr. Howard Saronsen, Principal, I. S. 24, Richmond.

Mr. Edmund Zaslow, Principal, P. S. 115, Queens.

With the help of such committees of experts and lay persons, questions are devised to test the knowledge and skills of applicants in realistic (close to actual job conditions), situations and problems which are based on the statement "duties of the position."

12. Every effort is made to be sure that the questions on the examinations are relevant and relate to specific duties of the job.

13. An analysis of two examinations, one for high school principal and the other for elementary principal is attached which clearly shows that each and every question

in the examination is related specifically to a duty called for by the Board of Education's statement of duties of the position. (Exhibit 4 A and B)

14. The procedures of the Board of Examiners in developing tests and the tests themselves have been reviewed by eminent authorities in the field of testing. Such authorities, without qualification, have found the Board's tests and procedures to be valid and reliable. (See Exhibits 2. a)b)c)d)) Professor Thorndike of Columbia has said:

> "In general, the Board of Examiners appears to have made a conscientious and informed attempt to develop test tasks that do correspond to selected ones of the specifications set forth by the supervisory persons who set out the requirements for the job."

15. It should be clearly understood that the Board of Examiners does not determine the duties for the job nor does the Board of Examiners determine the eligibility for the job. Such duties and eligibility requirements are determined by the Board of Education through the Superintendant of Schools (now Chancellor). The Board's function is to develop objective, valid and reliable examinations to test eligible applicants regarding the prescribed duties.

16. In addition to the establishment of procedures which insure the constant review for validity and reliability, the Board of Examiners has regularly conducted research in an effort to improve its testing procedures. Such research has been carried on for many years and is incorporated in numerous published and unpublished reports.

(Board of Examiners, New York, New York 1972)
(E.g., Teacher Selection Methods: An Analysis of Examination for Principal of Elementary Schools.) (unpublished) 1968-69.

17. Since 1967, the Board has conducted many research studies which seek to determine the validity and reliability of such tests as the written test (essay and short answer), supervision test, the written English test, the interview test and the oral appraisal of observed teaching tests. The recommendations emanating from such research have regularly been utilized in a continuing effort to improve examinations. For example, the written English test of 450 words, which requires 1-1/2 hours, was reduced to 350 words, requiring 1 hour, after research had demonstrated the validity of such reduction. This saving of time and money has applied to many thousands of applicants. Further, while providing for continued improvement, the research has confirmed the validity and reliability of the Board's examinations. See Summaries of Certain Research attached as Exhibit 4 c.

18. The plaintiffs' suggestion that the current study funded by the U.S. Office of Education is the "first it [the Board] has ever done" is an insult to the intelligence and integrity of the Board of Examiners as well as to the efforts of the researchers involved in its many research activities. The bald assertion by the plaintiffs that the Board has never complied with Section 2569, subdivision 1, of the New York Education Law is patently false. (Paragraph 27, Plaintiffs' Amended Complaint.)

19. The requirement of the plaintiffs that "tests be prepared and validated in accordance with the latest standards of professional psychological testing" reveals a profound ignorance of the literature of professional testing. The plaintiffs presume that there is a single universally agreed upon standard for testing and that there is a revision of this single standard periodically so that a "latest" one exists. Any expert in the testing field knows that there are many such acceptable standards and that the term "validity" refers to a test's being valid for a particular job or situation. The Board of Examiners, through a licensed School Research Associate who holds a doctorate in research is kept constantly aware of new developments in the field and embodies these, where applicable, in its tests.

20. In his affidavit, Dr. Barrett reveals a profound ignorance of the procedures of the Board of Examiners. He evidently has not taken the trouble to inform himself about them. Indeed, his affidavit recommends a procedure which has been followed by the Board of Examiners for many years, viz:

> "Some of the essay questions on this examination and on the 1964 examination for principal, day elementary school, present problems which appear to be related directly to school practice, and their inclusion might be justified on the grounds that they have content validity, that is, they might constitute a valid work sample. If they have content validity, they have the kind of inherent validity that a good typing test has for a typing job. However, for a test at this level to be justified on the basis of content validity, it is

> necessary that the job be analyzed, good and poor performance defined, questions relevant to significant aspects of the job prepared, level of acceptability of answers defined, and test scorers trained and supervised." (Paragraph 4 of affidavit of Dr. Richard S. Barrett, page 3.)

Dr. Barrett's sampling of the hundreds of supervisory examinations conducted by the Board of Examiners in recent years is confined to two, hardly an adequate number. In analyzing one of them, he confines himself to fewer than ten items of a 205-item short answer test. Further, he makes no inquiry whatsoever into the outcome of the examination and its effect on the population who took it.

Dr. Barrett also reveals an ignorance of appointment procedures of principals under the new Decentralization Law (Chapter 330 of Laws of the State of New York 1969). When he insists that the work of a principal varies "With the level of the school," the "socio-economic and ethnic make-up of the student body," etc., he is apparently unaware that qualified principals, under current law, may be interviewed by Community School Boards to determine the suitability of that eligible principal for a given school.

Dr. Barrett further reveals a lack of knowledge of the procedures of the private employer he cites, namely, the American Telephone and Telegraph Company. He says that their "selection procedures make little use of the type of questions typical of the supervisory tests I examined for purposes of this affidavit." The contrary is true. The American Telephone and Telegraph Company includes written tests which are designed, among other purposes, to determine the knowledge of prospective executives of

world affairs and current events. I make this statement on the basis of a personal visit to the assessment center to which Dr. Barrett refers.

Thus, it is apparent that Dr. Barrett has based his judgment and has formed his opinion on a complete lack of knowledge of the procedures of the Board of Examiners, on a lack of awareness of how principals are currently selected for assignment to schools, and on an incomplete understanding of the selection procedures of the private employer he cites.

21. In support of its allegations, the plaintiffs have attached, as Exhibit "B", an article by Gregory Jones in 6 Columbia Journal of Law and Social Problems, page 374. That article purports to quote statements made by me in an interview with Mr. Jones. The article is replete with false statements, misquotations and other inaccuracies. Attached hereto as Exhibit 5 is a review of some of Mr. Jones' more egregious misstatements.

Murray Rockowitz
Murray Rockowitz

Sworn to before me this
26th day of October, 1970
Mary M. Curran

MARY M. CURRAN
Commissioner of Deeds, City of New York
Kings County Clerk - No. 2-551
Commission Expires June 24, 1972

Affidavit of Robert Thorndike verified on October 9, 1970 (attached as Exhibit 2a to Rockowitz Affidavit)

~~67a~~

Exhibit 2a

TEACHERS COLLEGE COLUMBIA UNIVERSITY
NEW YORK, NEW YORK 10027

DEPARTMENT OF PSYCHOLOGY

Exhibit 2a

8 October, 1970

Dr. Murray Rockowitz
Board of Examiners
New York City Schools
65 Court Street
Brooklyn, New York 11201

Dear Dr. Rockowitz:

My name is Robert Thorndike. I have taught courses in measurement and test construction at Teachers College, Columbia University for over 30 years. I am the author of several books on personnel selection and educational and psychological testing. The following statement is based upon discussions with you and inspection of various documents relating to the specifications for, content of and analysis of examinations for principal and assistant principal.

Tests for the selection, classification and placement of personnel are of two general types. On the one hand there are aptitude tests. These are tests that undertake to measure potential of the individual for training and for developing the knowledge and skills that are necessary on a job. Thus, a test of finger dexterity or of speed of finger movement might perhaps serve as an aptitude test for a typist in that these underlying motor skills might be shown to be related to rate of learning to type or to level of competence in typing eventually developed. On the other hand, some tests should be classified as proficiency tests. These are tests that measure some aspects of the knowledge and skill that are called for on the job itself. Thus, a typing test in which a typist was called upon to transcribe a dictated letter from a tape accurately and with correct spelling and correct placement on the page would be classified as a proficiency test for a typist.

As I view the tests that are prepared by the Board of Examiners to place individuals on the list of those eligible for appointment as elementary school principal, it seems clear to me that these should be thought of as proficiency tests rather than aptitude tests. They endeavor to test some aspects (obviously not all) of the knowledge and skill that the principal will be expected to use upon the job. They are measures of the extent to which he has learned the requirements of the job, rather than tests of his underlying potential for later developing the knowledge and skill after a program of systematic training.

The standards for evaluating aptitude tests and for evaluating proficiency tests are quite different. Aptitude tests are primarily predictive, and the only basis upon which they can be evaluated is whether and to what extent they do in fact predict later progress in training or later development of competence and proficiency. Proficiency tests, on the other hand, are designed to appraise current competence. They must be evaluated in terms of the extent to which the aspects of knowledge and skill called for by the tests do in fact match aspects of knowledge and skill called for in the job for which they are designed. The appropriate criterion by which the tests are evaluated is the validity of the content of the test, in terms of its match to the specifications of knowledge and of skill called for in job performance, and a consideration of prediction is secondary, if it is of any importance at all. If one undertakes to evaluate the principals' examination as a proficiency test, the question that one must answer is how well the tasks called for by the test represent certain requirements of the job.

One undertakes to develop a content-valid proficiency test by setting forth fully and explicitly the requirements of a job and then by developing proficiency test tasks that correspond to those requirements. This is the general pattern that the Board of Examiners has followed in their efforts to develop tests such as the principals' examination. A statement of job requirements has been developed, based upon the pooling of judgment of high level supervisory personnel in the Board of Education, with some review by committees of educators and civilians. The specifications are reasonably full. They are based upon the background and experience of educators who have worked with elementary school principals in New York City over a period of years. In this sense they represent the pooled professional judgment of persons with a good many years of experience in the New York City educational system. This statement of requirements is available to candidates as they prepare for the test and it also guides the test-makers as they prepare test tasks. The closeness of match between the tasks as set forth in the examination and the duties of the job as set forth by the supervisory personnel in the city system can be evaluated only by informed judgment, not by statistics or manipulation of numbers. It is a judgment arrived at by examining the statement of requirements and by looking carefully at the questions together with the procedures set up for evaluating answers to those questions. In general, the Board of Examiners appears to have made a conscientious and informed attempt to develop test tasks that do correspond to selected ones of the specifications set forth by the supervisory persons who set out the requirements for the job.

Obviously, it is possible in any limited period of time to test only some of the requirements even if all of them could be reduced to a paper-and-pencil test or to an interview situation. Necessarily, any test represents a sampling of job duties and represents a sampling from among those that can be reduced to a paper-and-pencil or interview testing situation. Within these limits, the tasks that are represented in the test items appear to me to be reasonable tasks as representing selected ones of the job requirements.

A different and secondary issue with respect to tests as personnel selection devices has to do with the objectivity and reliability of the testing procedures. There is a basic trade-off involved here, in that simple knowledges and simple information can be tested very reliably and objectively but that

performance on tests of the more complex syntheses of knowledge and judgment required in actual functioning on a job can be evaluated only by judgment. It is impossible to reduce a complex response to a complex situation to a mechanically-scored multiple-choice kind of key. Consequently, in proportion as the test tasks become realistic and move towards dealing with a fairly complex synthesis of information and judgment, the appraisal of responses to them becomes necessarily also dependent upon the pooled judgment of appraisers. There, a variety of steps can be taken to make for consistent judgment on the part of the appraisers and to guarantee that the appraisal is in terms of the response itself rather than in terms of the person responding. Such procedures as never identifying the examinee by name on a test paper, providing the reader of the paper with a scoring guide indicating the kinds of issues to be dealt with and the credits to be allocated to each and so forth are possible, and these precautions appear to have been systematically and scrupulously observed by the Board of Examiners in their testing procedures. Though the assessment procedures cannot claim to be fully objective in the sense that any observer or any reader would automatically arrive at the same score or the same evaluation of the person being observed, they are objective and they are impartial in the sense that the scorer of a test paper is responding only to the answer provided to the question, and that the interviewer in an interview situation is responding only to a person who is not known to him. Also, in each instance, the scorers and interviewers are judging in terms of explicitly defined guides as to the qualities to be observed and the kinds of allocations of credit to be made on each. Within the limits of the possible, the Board of Examiners appears to have made conscientious efforts to make sure that partiality and partisanship do not enter into the evaluation of the responses to the tasks that they have set the examinees.

Very truly yours,

Robert L. Thorndike

Robert L. Thorndike
Professor, Psychology and Education

RLT:li

Appeared before me this 9th day of
October 1970

Grace Mason

Grace Mason
Notary Public

GRACE MASON
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-7752175
Qualified in New York County
Commission Expires March 30, 1972

Affidavit of Marvin Sontag verified October 12, 1970
(attached as Exhibit 2b to Rockowitz Affidavit)

71a Exhibit 2 b

TEACHERS COLLEGE COLUMBIA UNIVERSITY
NEW YORK, NEW YORK 10027

DEPARTMENT OF PSYCHOLOGY

Exhibit 2 b

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, et al.,

Plaintiffs,

v.

BOARD OF EXAMINERS, et al.,

Defendants.

CIVIL ACTION
No.
Civ.

AFFIDAVIT IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

Dr. Marvin Sontag, being duly sworn, deposes and says:

1. I am an Associate Professor of Psychology and Education at Teachers College, Columbia University.

2. As a member of the Psychology Department in this school, I teach courses in Educational and Psychological Measurement, as well as Research Methodology.

3. I have served as consultant to the New York City Board of Examiners on both the preparation of written examinations and the administration of interview examinations.

4. Prior to my appointment to Teachers College, I spent approximately twelve years with the Bureau of Educational Research of the New York City Board of Education. My last position with New York City was that of School Research Psychologist.

5. At the request of Dr. Murray Rockowitz of the New York City Board of Examiners, I have prepared this affidavit stating my impressions of the quality of the examinations conducted by the Board of Examiners.

6. First, I would like to address myself to the question of the validity of the examinations. In any procedure for selecting from among job applicants, two basic approaches are possible. The first is to test the proficiency of applicants in a number of areas deemed important to the job, ranking the examinees according to their proficiency as measured at that point in time. The second is to relate these measures to some criterion measure of job success taken after applicants have had the opportunity to function on the job for a period of time. The later procedure is employed to determine predictive validity. While in the abstract this second approach may appear desirable, a question remains as to whether or not such an approach would be truly practical for an organization such as the Board of Examiners, since large numbers of applicants who had already been examined and appointed to the position would be required, as well as good criterion measures of professional competence. It would take about 20 years to collect an adequate sample of appointees for most licences, and the literature is clear in the paucity of good criterion measures. In addition, the instrument for such a study should be preferably the same or closely similar for all subjects, and a long term data collection program with the same instrument would run the danger of a security leak. I would therefore conclude that in the practical world of the New York City Board of Education, the decision to de-emphasize predictive validity is a wise one.

7. In the measurement of proficiency, the most accepted procedures for achieving validity are to: prepare a careful job analysis; determine the skills necessary for the job; and test as wide a sample of these skills as possible. As the job descriptions accompanying all test applications are a matter of record, I shall not comment on them here. In determining the skills to be measured and in preparing the test items, the Board of Examiners routinely consults panels composed of both persons holding the particular jobs and university professors with expertise in the pertinent areas. Thus, a conscientious attempt is made to combine both practical and theoretical viewpoints. This thinking is kept current by employing a new panel each time an examination is offered. While no one can argue that the products are always perfect, this approach is all that can be hoped for in such a situation. It represents an honest attempt to achieve relevance and validity, and it allows the examination to reflect changes in thinking regarding the nature of a particular job.

8. Objectivity, as formally defined, is the extent of agreement among judges. In tests of the multiple-choice type, objectivity is not really an issue, since anyone applying a key will come up with substantially the same result. With machine scoring as employed by the Board of Examiners, the issue becomes almost non-existent.

9. In the case of essay examinations, concerns for objectivity become important. Let us consider for a moment the steps recommended by most experts to insure objectivity on an essay examination. These include:

   a. insuring the anonymity of the applicant,
   b. preparing keys in advance in as specific fashion as possible,
   c. assigning weights to each response in advance, and
   d. scoring one item at a time.

If one compares the procedures of the Board of Examiners to this list, it is quite evident that great pains have been taken to insure objectivity. As papers are identified by an anonymous perforated number, the scorer does not see the name of any applicant. All answers and weights are specified in great detail and reviewed by a panel prior to their use. All responses to a single item are scored by a single panel, and, in most instances, different examiners score different questions. Again, in the case of the written examinations, I would rate the procedures taken to insure objectivity as excellent.

10. In the case of interview examinations, the task of obtaining objectivity becomes more difficult. Nevertheless, training sessions for interviewers, operational definitions of the traits being rated, and the use of at least two examiners for each interview represent a superior approach to this problem. The addition of a tape recording for review of the interview in questionable cases is another important step in the direction of objectivity.

11. The routine review of all cases that come within ten (10) points of passing as well as an appeal procedure for failures are further testimony of the claim that superior procedures have been adopted to insure objectivity.

Marvin Sontag

Signed and sworn before me

this 12th day of October 1970

Paul Renault
Notary Public

PAUL RENAULT
Notary Public, State of New York
Residing in Nassau Co. No. 30-8545-100
Commission Expires March 30, 1972

Affidavit of Aaron Suss Carton verified on October 25, 1970 (attached as Exhibit 2c to Rockowitz Affidavit)

Exhibit 2c

Exhibit 2c

My name is Aaron Süss Carton. I reside at 3 Hunter's Court, Setauket, New York. I am Associate Professor of Education at the State University of New York at Stony Brook. I have been engaged in educational research almost continually for the past 12 years in a variety of capacities. Problems of measurement and testing were an integral part of my research and in the field of foreign language education I have participated in the development of tests and conducted evaluation programs. Alone, or in collaboration, I have produced numerous reports and articles in professional journals.

The Board of Examiners of the Board of Education of the City of New York has requested my professional assessment of its testing procedures. My sources of information about these procedures consist of: (a) a briefing by the Board of Examiners which consisted of a description of the history of the Board, a description of its policies and procedures and a period of intensive questioning by participants where all questions were answered completely and candidly; and (b) inspection of a large sampling of documents which included descriptions of test procedures, a history of the Board of Examiners, specimens of tests for principals and assistant principals given in the last decade, instructions to Examination Assistants, announcements, and research reports and test evaluations prepared by the Board of Examiners and research proposals describing research in progress or research to be initiated. In addition, I have served on several occasions as an Examination Assistant for the test for Research Technicians participating in the phases of item-writing, paper-scoring and interviewing. I have read sections of the Memorandum for Injunctive Relief: Chance and Mercado v. The Board of

Examiners and a number of affadavits in support of that brief. On the basis of the foregoing I feel prepared to submit the following observations about the objectivity, reliability, and validity of the testing procedures of the Board of Examiners which I feel are relevant to the matters under consideration.

I. For the Board of Examiners, concern for objectivity, or freedom from bias, emanates not only from an effort to keep its testing procedures in accord with the standards of the testing profession, but also from an earlier mandate for establishing and maintaining a system of appointments and promotions in the schools of the City of New York that would be free from the abuses of patronage, corruption, and pressures from any special economic, social, ethnic, or political interest. Thus an elaborate set of procedures and safeguards was developed and maintained to protect candidates from unfair competition. Having studied these procedures, I feel that particularly in the written tests, there is little likelihood that errors or slippage (should they even occur) would favor, in a systematic or biased way, the interests of a single candidate or group.

Interview tests, or any procedures that involve ongoing interactions of other human beings with a candidate, are, by their very nature, always somewhat more vulnerable to conscious or unconscious subjective responses (or "halo effects") to the candidate or to the groups to which he belongs. By randomizing the assignment of interviewers, by always assigning three interviewers to examine a single candidate, by explicitly specifying the criteria and attributes that are to be rated, by clarifying which attributes are not to be rated and the pitfalls of halo effects, by requiring interviewers to keep written records and to provide justifications for their ratings, by providing tape-recordings of all interview transactions the Board of Examiners has scrupulously sought to reduce to the limit the

possibility of bias in the interviews. Barring the occurrence of practices not known to me, I feel confident in asserting that the Board of Examiners has achieved in its test procedures a level of "disinterestedness" that competes in this respect with all screening, testing, and recruiting procedures that have been devised and are currently used and certainly excels most informally or unprofessionally formulated procedures. Within the bounds of the criteria that have been established for any test, a candidate before the Board of Examiners may expect to be assured of open and fair competition.

II: The reliability, or accuracy with which a test procedure measures that which it purports to measure, is an evident matter of concern for the Board of Examiners. There are a number of technical approaches for determining the reliability of a test each of which yields a numerical coefficient or index of the degree of reliability of the test. The appropriateness of one or another technique, or group of techniques, for determining the reliability of a given test will depend on the nature of the test and the aspects of the test which might prove to be sources of error or unreliability.

Measures of "internal consistency" are appropriate when a series of items or test procedures are intended to measure a single trait. A study reported by the Board which examined the scoring of a test of written English revealed very high coefficients of reliability and attested to a conformity with high technical standards in test evaluation and test construction.

When a test is intended to measure more than one trait, skill, attribute, or field of knowledge, the possibility of its successfulness is enhanced when the parts are not correlated with each other (i.e. did not show

overall internal consistency) while a high level of internal consistency, or reliability, is maintained within the parts. Such tests are best when the several parts are, furthermore, highly correlated with the total score yielded by the test. Two studies by the Board revealed total test procedures that met these high standards of reliability. One of these studies was an Analysis of Examination for Principal (1965) and is particularly germane to the matter at hand.

A study of Intra- and Inter-rater Reliability of the Interview Test, conducted to determine which rating forms are most conducive to arriving at high reliabilities or internal consistencies among interviewers (but, apparently, not conducted in connection with any specific test administration) reveals that a high level of agreement, or reliability, among interviewers can be achieved using the optimum forms the Board seeks to develop while retaining a high degree of discrimination, or distinction, among candidates. This study attests to the vigorousness with which the Board seeks to perfect its test procedures.

"Repeat" or "test-re-test" reliability indices are designed to reveal the durability or consistency of a measure over specified periods of time. The Board failed to adduce evidence that its test exhibited this type of reliability beyond the usual presumption that test which are internally consistent are likely also to be durable. It must be granted that given the arduousness of most of the tests administered by the Board and given the small likelihood that candidates could be persuaded to sit for alternative forms of the tests on separate occasions when doing so would only serve the purposes of a study and not their needs for licensing, that it would be very unlikely that a successful study of repeat reliability could be staged. Furthermore, it must be granted that inherent in studies of repeat reliability is an assumption that the trait measured remains consistent

within individuals. Such an assumption might be a questionable one in respect to the traits studied by the Board of Examiners, particularly if one has faith in the notion that training and study can change and improve one's preparation for a job or a test.

III. The approach used by the Board of Examiners in determining the validity or relevance of its tests consists essentially of a strategy which relies on the judgments of experts and consensus among them as to what constitutes an appropriate test item. The level of validity that may be achieved in this regard is implicit in the procedures used for developing the tests (i.e. starting with a series of job-specifications and assigning expert practitioners the task of writing appropriate items) but it is limited to the validity of the "best guess" of experts. Without studies of predictive validity (i.e. assessments as to how well the test selects individuals who function successfully on the job) the very assumptions as to what constitutes expertise in any given field cannot be fully tested. (As far as I know, however, licensing examinations for professions such as medicine, law, psychology, various social and health services, etc. are not any more widely validated by extensive follow-up studies than the examinations used in education.)

In the case of the Principals' Examination of the Board of Examiners one modest exploratory study of rated on-the-job performance did tend to confirm the predictive validity of the test. This study encountered a number of methodological snags which would seem to be almost inevitable given the complexity of the problem and the complexity of the system in which it is situated. Fittingly, the researchers interpreted their results conservatively and modestly. Yet an outsider might be permitted to feel encouraged by their results. Other studies of a more profound nature are

underway or are, at least, fully planned.

The most recent forms of the Principals' Examination consist mainly of items that are closely tied to specific problems of schools and apparently seek to assess the judgment and prudence that a candidate might exhibit when confronted with situations that evidently comprise the daily problems of the job. To assume that these tests can be valid predictors of success in leading a school one must also assume (a) that the judgments a candidate makes on a written test or interview are likely to be of the same quality as those he will make in a real-life situation; and (b) that the informed opinions in the field of school administration are, in fact, well-suited to the effective leadership of schools. The Board of Examiners evidently finds these assumptions to be reasonable and legitimate.

In the procedures of the Board of Examiners, the definitions of what makes a good school principal are prepared by the Superintendent of Schools. The test writers derive "validity criteria" from the job specification and definitions. It seems to me that it is actually with these criteria —and not with the testing— that the plaintiffs in the matter at hand seem to have their cavil. As far as I can tell, the brief seems to ask for a new definition of a school principal. Thus it is a matter that goes beyond the issue of testing and licensing examinations. Or it may be seen as a matter that precedes examinations, for in order to develop a test, the preparation of items and procedures must be preceded by clear validity criteria.

As a student of language I am particularly interested in the social and cultural implications of the objections to the tests of written and verbal expression. A plea for profound and complex changes in social and cultural attitudes is implied by the plea for altering testing in regard to the linguistic behavior of educational leaders. A full exploration of this matter is beyond the scope of this document and is probably not germane to the

matter at hand. Yet in deliberations in respect to this matter, it would seem well-advised to note that it is fraught with issues that are not part of its central theme.

Aaron J. Carton

State of New York
County of Suffolk ss:

Sworn to before me
this 25th day of October 1970

Frank A. Rinaldi

FRANK A. RINALDI
NOTARY PUBLIC, State of New York
No. 24-3228760
Qualified in Kings County
Commission Expires March 30, 1971

Affidavit of Esin Kaya Carton verified on October 25, 1970 (attached as Exhibit 2d to Rockowitz Affidavit)

Exhibit 2 d

83a

Exhibit 2d

October 13, 1970

To Whom It May Concern:

My name is Esin Kaya Carton. I reside at 3 Hunters Court, Setauket, New York 11733. I am employed as a professor of educational psychology at Hofstra University and am appointed as the chairman of the Department of Educational Psychology.

I hold a BA degree from Barnard College earned in 1954, MA degree from Teachers College, Columbia earned in 1955 and Ph.D from New York University earned in 1959 in educational and psychological measurement. I have served on NYU and Hofstra faculties since 1957 and have consulted to governmental, public and private organizations always in the capacity of a specialist in educational and psychological measurement. I have published and/delivered more than fifteen papers in this area.

Esin Kaya Carton

The points given below as reactions to the procedures used by the Board of Examiners in screening candidates for the positions of assistant principal and principal in New York City are based on two main sources of information: (a) a close review of the materials made available by the Board of Examiners and (b) a meeting with the representatives of the Board where questions were answered by them.

Sound evaluation procedures concern themselves with problems of validity or relevance, objectivity or elimination of bias, and reliability or accuracy of the results. As I understand the procedural objectives that have been raised to the Board's testing program, they center around (a) the relevance of the testing program to performance on the job; (b) objectivity in testing and scoring and (c) the reliability of the test results.

It is my professional judgment that the Board has attempted to deal with all three of these important procedural matter in a professional way to the best of its ability.

On the question of objectivity. The Board has a list of fourteen methods used to insure objectivity. In addition to these fourteen methods to insure objectivity, there are further statistical techniques which can be used to investigate the degree of objectivity achieved. I have read among the materials submitted to me two papers which show the application of such techniques.

On the question of reliability. I have read among the studies conducted by the Board of Examiners a paper dealing with the internal consistency of the written examination and one with inter-rater reliability of the interview ratings. Both cases represent proper application of reliability techniques

On the question of relevance. The procedures used to establish the validity of the tests indicate that the items selected for the examination represent an attempt to simulate the events candidates would encounter on the job. There are different techniques for either assuring or studying the relevance of the test to the requirements of the job. The technique used by the Board, namely establishing content-validity, attempts to assure the relevance of the items on the test to job criteria established by the professionals in the field. While a second technique, namely establishing predictive validity, would add further information concerning the relevance of the test to job performance and would be desirable to have, it is not essential to establish the relevance of the test to the criteria of performance on the job.

The purpose of the testing program is to screen some applicants on the basis of some professional criteria specified by the professional educators in the field. At the end of the testing program, I understand there are approximately six times as many candidates who pass the examination as there are job openings. If there are any criteria or requirements specific to a given local position, there is no reason why these additional criteria may not be applied locally in the selection of the individual to fill the position. All that the testing program seems to do is to evaluate the standing of the applicants on what would be the most universal, minimal professional performance criteria which would apply regardless of local differences.

Generally, it is desirable to use as much information as possible about a given applicant in selecting him for an opening. In obtaining such information, the most useful group of data consist of pieces of information which complement each other, which are independently relevant to the job requirements but which do not correlate among themselves. One study, conducted by the Board, shows the correlations among the sub-tests to be low, but the correlation between each sub-test and the final acceptance score to be quite high. Similarly, the testing program has greater value if it supplies information on the criteria deemed minimally desirable for all openings, and complements but does not correlate with other possible criteria (such as bilingualism) desired in a specific location.

State of New York)
County of Suffolk) ss.: x Elaine Kaya Carton

Sworn to before me
this 25th October 1970

Frank A. Rinaldi

FRANK A. RINALDI
NOTARY PUBLIC, State of New York
No. 24-7207600
Qualified in Kings County
Commission Expires March 30, 1971

Affidavit of Jay E. Greene verified on
October 26, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE and LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

BOARD OF EXAMINERS, et al.,

Defendants.

- -X

Civ. No. 4141
Index No. 70

AFFIDAVIT

STATE OF NEW YORK)
: SS:--
COUNTY OF ~~NEW YORK~~ Kings)

JAY E. GREENE, being duly sworn, deposes and says:

1. I am a member of the Board of Examiners of the Board of Education of the City of New York, and one of the defendants herein and submit this affidavit in opposition to plaintiffs' motion for a preliminary injunction.

2. I have been a member of the Board of Examiners since 1950. Prior to my appointment as an examiner, I was employed by the New York City school system as a teacher and supervisor for over 14 years.

3. Paragraph 20 of plaintiffs' Amended Complaint recites various statistics indicating that there is a low percentage of black and Puerto Rican supervisors in the New York City school system. On the basis of the aforesaid recitation, Paragraph 21 of the Amended Complaint concludes that " The Board of Examiners procedures are the major factor accounting for this low percentage in

minority group personnel." Assuming, for the sake of argument, that the plaintiffs' statistics are accurate, its conclusion, in Paragraph 21, is absurd and totally unsupported or unsupportable by any facts. The Court must understand that the Board of Examiners does not determine the eligibility requirements for applicants for supervisory positions. Those are determined by the State Education Department and the Board of Education through the Chancellor. Thus, it is obvious that the number of black or Puerto Rican applicants cannot be a function of the Board of Examiners' procedures. The Board examines only those who are eligible under requirements set by the Board of Education. If few blacks are eligible, obviously, the number of blacks who are licensed will be small. Clearly, the Board of Examiners has no control over the number of black and Puerto Rican applicants. Accordingly, the recitation of statistics concerning the percentage of blacks and Puerto Ricans among the total number of licensed supervisors, is irrelevant to these proceedings.

4. If statistics have any relevancy in determining the claim of discrimination, the only meaningful statistic would be a comparison of the pass-fail ratio of black and Puerto Rican applicants.

5. If such an evaluation were undertaken, it would demonstrate clearly that eligible black or Puerto Rican applicants have performed comparably with white applicants on examinations. Thus, in the 1964 examination

for elementary principal, it is believed that approximately 7 black and Puerto Rican individuals applied, of whom we are informed 5 achieved a place on the list. In the 1964 examination for principal of a junior high school, it is believed that 5 black and Puerto Ricans applied, of whom two were placed on the list. In the 1968 examination for principal of a day high school, it is believed that only 5 applied of whom 2 passed all parts of the examination. (One of these two proved to be ineligible after passing all parts of the examination.) In this examination there was a 40% ratio passing as compared with approximately 25% of whites. In the examination for assistant to director of libraries, there were 19 applicants of whom it is believed 4 were blacks or Puerto Ricans and the list had 2 blacks or Puerto Ricans out of 4 successful candidates on the list. In the 1964 examination for supervisor of C.R.M.D. (Children with Retarded Mental Development) it has been estimated that there were 7 blacks and Puerto Ricans among a total of 46, and the list is believed to have placed 5 blacks and Puerto Ricans out of a total of 18 candidates on the list. In the 1964 examination for assistant to principal in elementary schools, the first supervisory examination in which a substantial number of black and Puerto Rican individuals applied, the results were, according to a study by the Human Relations Unit of the Board of Education, that out of a list of about 700 successful candidates, 20% or 140 successful candidates were black

or Puerto Rican. (Staff Bulletin, Jan. 10, 1966, attached hereto as Exhibit /). In the summer of 1970, a closed examination was given to 7 black applicants and one Puerto Rican for the principalship of high school and junior high school. Five of the eight (including the Puerto Rican) were successful, and one is still under consideration. The same type of scope and job-related examination was used in this examination as in prior promotion examinations. The number of minority group members listed was larger because larger numbers filed.

6. The small number of eligible black and Puerto Rican applicants can readily be explained by an understanding of the sources from which such applicants are derived. In any given year, the numbers of teachers in the New York City school system who are graduates of the City University of New York will run from 55 to 70% of the total. Since the City University supplies the great bulk of New York City's teachers, it is quite relevant to look at the ethnic composition of their student bodies in recent years. A recent report by the City University shows the following student body distribution:

	(1967)	(1968)	1969
White	(87.0%)	(85.6%)	80.2%
Black	(6.4%)	(8.1%)	9.9%
Puerto Rican	(1.9%)	(2.3%)	3.0%
Other	(3.8%)	(2.4%)	3.8%
No Response	(.8%)	(1.5%)	3.1%
TOTAL.	(99.9%)	(99.9%)	100.0%

Report of the Fall 1969 Undergraduate Ethnic Census, The City University of New York, Office of the Vice-Chancellor for the Executive Office, December, 1969, attached hereto as Exhibit 2.).

7. Obviously, all of the graduates of City University are not entering the teaching profession so that the percentage of black and Puerto Rican graduates available to become applicants for teaching positions is considerably smaller. Thus, it is clear that the small number of teaching and supervisory positions held by blacks and Puerto Ricans in the past has had nothing to do with the activities of the Board of Examiners.

8. Far from demonstrating a pattern of discrimination, the statistics presented by the plaintiffs (Table II) demonstrate that the number of black and Puerto Rican supervisors is rapidly increasing. For example, in 1963, the plaintiffs allege there was only one black or Puerto Rican principal and in 1970 there were 12 black or Puerto Rican principals. Even more dramatic is the assistant principal category where, in 1963, there were 11 black or Puerto Rican assistant principals and in 1970 there are 119. It is fair to assume that a substantial portion of this 119 are applicants for the current elementary school principal's examination, which this action seeks to enjoin.

One additional factor tending to keep the percentage of black and Puerto Rican principals in New York City lower than that in some other cities is the fact that

the eligibility requirements for such positions in New York City have been higher than in other cities. In the past, eligibility requirements for principalship in New York City have involved 10 to 15 years of teaching experience, including experience on an intermediate supervisory level. We are informed that, in the other cities, intermediate supervisory experience has not been required and 3 to 6 years of teaching experience was required. Eligibility requirements are not set by the Board of Examiners. However, recently revised eligibility requirements in New York City now make it possible for hundreds of blacks and Puerto Ricans to apply. Moreover, the list will be an "open-qualifying" one, and communities will be able to choose any person from the list so that the number of licensed principals of black and Puerto Rican background in service is likely to increase dramatically in the near future.

9. Contrary to the plaintiffs' contention that the Board of Examiners has participated in a program of discrimination against blacks and Puerto Ricans, it is a fact that it was at the suggestion of the Board of Examiners that the Board of Education instituted professional preparational seminars to guide applicants in their preparation for examinations. Such special seminars are in operation and are located in geographical areas heavily populated by blacks and Puerto Ricans. Currently, there are 346 blacks and Puerto Ricans in these seminars and it has been estimated that the great bulk of these have filed for the

November 3rd examination for principal as compared with approximately 7 such applicants in the previous examination. Certainly, such efforts belie the plaintiffs' contention that such applicants "are untutored in the esoterics of test-taking in the New York City school system," (Plaintiffs' Amended Complaint, paragraph 2) and "have not had equal access with whites to esoteric knowledge of the bureaucracy." (Plaintiffs' Memorandum, page 6.)

10. Far from the negative view expressed by the plaintiffs' Amended Complaint and Brief that blacks and Puerto Ricans are systematically being excluded from the New York City school system, the facts reveal positive gains in accelerating the rate of entry of blacks and Puerto Ricans into the teaching profession. It is estimated that, whereas, there were perhaps 1,500 black and Puerto Rican teachers in 1963, there are about 6,000 at the present time. Moreover, substantial numbers are applying now, whereas few applied in the past. In addition, the U.F.T. and the Board of Education, assisted by the Board of Examiners, as of this fall, are beginning a recruitment effort for the major purpose of adding hundreds of blacks and Puerto Ricans to the staff. In New York City schools there are approximately 20,000 para-professionals, the vast majority of whom are black and Puerto Rican. A career ladder is being developed to give many of these an opportunity to advance to teaching positions.

JAY E. GREENE

SWORN to before me this
26th day of October, 1970.

Mary M. Curran
Notary Public.

MARY M. CURRAN
Commissioner of Deeds, City of New York
Kings County Clerk - No. 2-551
Commission Expires June 24, 1971

Affidavit of Murry Bergtraum verified on
October 26, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE and LOUIS C. MERCADO, et al.,

70 Civ. 4141

Plaintiffs,

AFFIDAVIT

against

BOARD OF EXAMINERS, et al.

Defendants.

- -X

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

MURRY BERGTRAUM, being duly sworn, deposes and says:

1. I am President of the Board of Education of the City of New York, one of the defendants herein, and I submit this affidavit in opposition to plaintiffs' motion for a preliminary injunction.

2. The instant action, brought under 42 U.S.C. §§1981 and 1983 and their jurisdictional implementation, 28 U.S.C. §1343 (3), is for injunctive and declaratory relief. The two named plaintiffs are acting principals of elementary schools in New York City and holders of New York State principal's certificates. They do not hold a New York City license as elementary school principal which is necessary to obtain an appointment in the New York City school system. It is alleged in the complaint that one of the plaintiffs is Black and the other is Puerto Rican and it is further alleged that they bring this action on their own behalf and as a class action pursuant to Rule 23, F.R.C.P.

3. It is alleged that the defendant Board of Examiners will hold an examination for elementary school principal during the Autumn of 1970 and will promulgate an eligible list in the Spring of 1971 based on such examination (Complaint, par. 12).

4. Plaintiffs' claim that there is a low percentage of minority groups in New York City School System employed in supervisory capacities and that this is due to the testing procedures employed by the Board of Examiners. Allegedly, these procedures are biased against Blacks and Puerto Ricans. (Complaint, pars. 13, 14 and 15).

5. Plaintiffs further allege that the examination procedures employed by the defendant Board of Examiners are in violation of the United States Constitution and the Constitution and laws of the State of New York. It is further claimed that the Board of Education in violation of State Law has, in the past, left, and plans to leave, to the Board of Examiners exclusive discretion in the preparation, administration and grading of the forthcoming examination procedure for elementary school principal.

6. Plaintiffs request this Court to declare the present and planned examination procedures employed by the Board of Examiners to be unconstitutional. They seek to enjoin the defendants from using any examination for principal which has not been prepared in accordance with academic and professional standards established by the Board of Education.

7. Incident to this action is the present motion brought pursuant to Rule 65 FRCP seeking to preliminarily enjoin the defendants from:

(a) Administering or otherwise making use of any written and/or oral test, as a criterion for the New York City license of elementary school principal or for any other New York City public school system supervisory license, which has not been prepared and validated in accordance with the latest standards of professional psychological testing as accurately measuring the merit and fitness of candidates to perform the tasks of the position for which the test is being administered; and from

(b) administering or otherwise making use of an examination for principal which has not been prepared in accordance with, which does not strictly adhere to, and which in no way exceeds specific academic and professional standards for the license of principal established by the Board of Education pursuant to §2573 (10) of the New York Education Law, and for such other relief as the Court may deem just and proper.

8. The Board opposes plaintiffs' motion for preliminary injunction because as hereinafter set forth the granting of the interim relief sought would be disruptive to the entire school system of the City of New York.

9. The written portion of the examination for elementary school principal is scheduled for November 3, 1970. The eligibility requirements, the scope of the examination and other relevant data concerning the examination are set forth in an Examination Announcement, dated

September 11, 1970, a copy of which is annexed and marked Exhibit "A". It is the announced intention of the Board of Examiners and the office of Teacher Personnel of the Board of Education to conduct written, oral and medical tests in this examination at a site in Puerto Rico, as well as in New York City. This examination was announced on September 11, 1970. It was requested by the then Acting Superintendent of Schools, Mr. Irving Anker, with the recommendation that the examination be completed, if possible by February 1, 1971, or at the latest in the Spring of 1971.

10. In addition to the elementary school principal examination, many other supervisory examinations have been conducted, are being conducted, and are projected by the Board of Examiners. A report on the status of these examinations is annexed and marked Exhibit "B".

11. If plaintiffs' motion for a preliminary injunction is granted then all of these examinations will be disrupted. This result would be highly injurious to the New York City school system and the children attending its schools. It would deprive those schools of primary and intermediate leadership in supervision, in administration, curriculum direction, and relationship with parents and the community. Plaintiffs suggest that persons could be assigned in acting capacities to fill the void. However, it is self evident that an acting principal or other acting supervisor is not in a position to act with the continuity, authority and assurance attendant upon appointment to a position and the resulting tenure in office. The necessity to have fully tenured supervisors at all levels is reinforced by the extreme difficulties face by our schools, school

boards, students, parents, teachers and administrators in this transition period from a centralized school system to a decentralized one.

12. As a result of the liberalized pension benefits granted by the New York State Legislature in 1969 it is anticipated that more than 50% of the present supervisory staff will retire within the next four years with the bulk retiring within the next year or two. This is the reason for the request of the Acting Superintendent of Schools that the promulgation of a list of principals in day elementary schools be effected not later than the Spring of 1971. It would be an unnecessary hardship on the system to postpone the announced examination as well as other supervisory examinations when the need is so pressing now and will become much more acute within a short time.

13. The Board of Education's opposition to the plaintiffs' motion for a preliminary injunction is not based upon an evaluation of the merits of plaintiffs' overall case. The Board is of the opinion that the complaint raises issues of fact which should be determined at a trial. The Board's position is that the sole statutory responsibility for the administration of tests for supervisory personnel lies with the Board of Examiners.

14. New York Education Law §2569 provides in pertinent part:

> "It shall be the duty of the board [of examiners] to hold examinations whenever necessary, to examine all applicants who are required to be licensed ... The board [of examiners] shall periodically review the validity and reliability of examinations as well as examination procedures."

15. Since Education Law §2569 devolves the duty upon the Board of Examiners to administer all license examinations it is the position of the Board of Education that the Board of Examiners should satisfy the burden of defending their examination procedures.

16. In conclusion, in view of the great disruption to the New York City School System which would be caused by the granting of the preliminary relief plaintiffs seek, it is respectfully requested that their motion for a preliminary injunction be denied in all respects.

Sworn to before me this
26th day of October, 1970.

DANIEL W. KINGSTON
Notary Public, State of New York
No. 41-7273100 Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1972

MURRAY BERGTRAUM

MURRY BERGTRAUM

Temporary Restraining Order filed on November 4, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE and LOUIS C. MERCADO, etal.,

Plaintiffs

,

against

THE BOARD OF EXAMINERS, etal.

Defendants.

- -X

CIVIL ACTION
70 Civ. 4141

COUNTER PROPOSED ORDER FOR TEMPORARY RESTRAINING ORDER

This cause came on to be heard on plaintiffs' motion for a preliminary injunction, and the Court has decided to take the matter under advisement and to defer its ruling thereon. It appearing to the Court from the complaint, the amended complaint, the affidavits, exhibits and memoranda heretofore filed in support of the motion and in opposition thereto, and the oral argument heard on October 27 and 29, that pending the determination of this motion the defendants may commit certain acts resulting in a change of the status quo, it is

ORDERED that pending the determination of this motion, the defendants are henceforth restrained from promulgating or otherwise publishing any new eligible lists for supervisory service positions in the New York City school system, provided, however, that this order shall not restrain the administration of examinations for supervisory service positions nor is it applicable to any eligible lists for supervisory service positions promulgated prior to October 29, 1970, or restrain the appointment of supervisory service personnel therefrom.

Dated: New York, New York
November 4 1970

/s/ Walter R. Mansfield
U.S.D.J.

AFFIDAVITS IN SUPPORT OF MOTION
SUBMITTED ON NOVEMBER 6, 1970

Affidavit of Peter J. Strauss verified on
November 4, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LUIS C. MERCADO, et al., Plaintiffs, -against- BOARD OF EXAMINERS, et al., Defendants.	Civ. No. 4141 Index No. 70 AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUCTION

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

PETER J. STRAUSS, being duly sworn, deposes and says:

1. I am an attorney-at-law and partner in the firm of Moldover Hauser & Strauss at 110 East 42nd Street, New York, New York. I am presently Chairman Pro-tem of Community School Board #2 in Manhattan. I submitted an affidavit previously in support of plaintiffs' motion for preliminary injuction in the above-captioned case. I have read the affidavit of Murray Rockowitz, dated October 26, 1970, submitted in opposition to said motion. I am submitting this affidavit in reply to Mr. Rockowitz and in further support of plaintiff's motion for preliminary injunction.

2. In paragraph 11 of Mr. Rockowitz' affidavit, he states that the Board of Examiners assembles committees of experts and lay persons to help select the most significant duties and qualities being tested for and to devise test questions relevant to the job at issue. He cites as an example of this process a meeting that took place December 12, 1969, which he notes that I attended, to consider the examination for Principal, Day Elementary School (the written portion of which is scheduled for November 3, 1970).

3. I did in fact attend this meeting. It lasted approximately two hours. So far as I know it was the only meeting of outside experts and lay persons assembled for the purpose of considering the Elementary School Principals' Examination at issue. Indeed, I know of no other such meeting in connection with any supervisory examination.

4. This meeting was not called for the purpose of obtaining the views of the consultants "on the qualities being tested for" (Paragraph 11 of Mr. Rockowitz' affidavit) in the proposed exam or to discuss appropriate selection criteria. Rather, the invitation to attend the meeting requested our views on the examination format and techniques. (See attached Exhibit 1, letter of invitation to the meeting from Marvin Weingart, head of Unit 5, Board of Examiners.) During the course of the meeting it became apparent to several of us who participated in the meeting (listed in paragraph 11 of Mr. Rockowitz' affidavit) that it was impossible to consider the appropriateness of testing techniques and questions without considering the qualities to be tested for. It is my recollection of the meeting that the ensuing discussion of the qualities to be sought in a candidate was initiated by the consultants, not by Mr. Rockowitz or any other representative of the Board of Examiners. Many of us expressed our dissatisfaction with the adequacy and relevance of the qualities which the Board of Examiners was apparently intending to test for, based on the established "duties of the position." We indicated that in our view it was essential to test for qualities which traditionally have never been considered by

the Board of Examiners in examining principals.

5. The meeting concluded without any sort of consensus or agreement having been reached between the consultants present at the meeting and the members of the Board of Examiners and their assistants present. There was never any follow-up to the meeting.

6. To my knowledge, the "duties of the position" previously established were in no way varied or modified as a result of the meeting. On August 28, 1969 the Board of Examiners issued an announcement for an examination for the position of Principal, Day Elementary School. Said announcement included a listing of the "duties of the position." A copy of said announcement is attached hereto as Exhibit 2. On September 11, 1970 as part of the announcement by the Board of Examiners of the examination for the position of Principal, Day Elementary School, to be held on November 3, 1970 (the examination in regard to which I had been invited to discuss at the meeting on December 12, 1969) the Board of Examiners issued another list of the "duties of the position". A copy of said announcement is attached hereto as Exhibit 3.

A comparison of the two lists of "duties of the position" reveals that they are virtually identical. It would appear, therefore, that the meeting which I attended on December 12, 1969 had no effect whatsoever on the planning for the November 3, 1970 examination.

PETER J. STRAUSS

Sworn to before me this
4th day of November, 1970.

EDWARD D. MOLDOVER
Attorney and Counsellor at Law
State of New York No. 41-2741[illegible]

Affidavit of Richard S. Barrett verified on
November 5, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated, Plaintiffs,	CIVIL ACTION
v.	70 Civ. 4141
THE BOARD OF EXAMINERS, et al., Defendants.	

AFFIDAVIT IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

RICHARD S. BARRETT, being duly sworn, deposes and says:

1. My name is Richard S. Barrett, and I submit this affidavit in support of plaintiffs' motion for preliminary injunction. Subsequent to my affidavit of October 15, 1970, I have examined an affidavit of Murray Rockowitz dated October 26, 1970, together with its attached Exhibits 1, 1a, 1b, 2a, 2b, 2c, 2d, 3, 4a, 4b, 4c, 5, submitted in opposition to plaintiffs' motion for preliminary injunction. I base my comments on them. The selection of documents is more notable for what is omitted than for what is included. They raise abundant doubts and questions that could have been answered by the submission of related documents that were not presented. Thus Exhibit 4c, which contains very brief summaries of research results is particularly inadequate; no judgment about the studies reported therein can be made without extensive information about the methods employed. The average report fills less than half of

a page. Only two of these studies even purport to go to the essential question of validity. One of these ("Analysis of Examination for Principal-Academic High School-Nov., 1965") is not truly a validity study since it reports only interrelationships among scores (see ¶5c below). The other ("Analysis of Examination for Principal of Elementary Schools"), which is reported in only five lines of type, gives no information on methodology, data analysis, or statistical significance of results. Without access to the more complete reports, it is impossible to comment on the adequacy of the work, the accuracy of the conclusions or, indeed, whether the studies have any significance for this case. The value of the following analysis is therefore limited by the inadequacy of the documentation, but the inadequacy of the documentation speaks for itself.

2. The development of a selection procedure begins with a description of the duties of the incumbent, and how and why the work is performed. Generally the job description must be specially done for the selection program because job descriptions done for other purposes are rarely adequate. Exhibit 3 to Rockowitz' Affidavit, Duties of the Position (Principal of a Day Elementary School), illustrates the point. Useful as the description may be for delineating or fixing responsibility, it gives few clues to how the work is done, what performance is likely to be successful, or what qualities of a candidate lead to success. Certainly, "To organize and administer a modern audio-visual program" is part of the job, but what does one do to achieve the objective? How important is it compared to other duties?

It is also important "To work to build and maintain high teacher morale," but there are countless unspecified acts of principals that further or frustrate this goal, yet no clues are given in the description.

A sound selection program requires a detailed analysis of the position in terms that are relevant to the selection process. The job description included in the exhibits is inadequate for developing a selection procedure.

3. Exhibit 1a to Rockowitz' affidavit, Directions for Formulating Standard Answers and Rating Directions, prescribes in part "First, give the matter of the appropriate answer some thought and study. Consult authorities. Then read through a representative sample of answers . . . Draw up a tentative standard answer (with rating directions), bearing in mind the applicability of your standards to the answers used . . . ."

The scoring key is thus derived from the answers of the candidates. If the person who framed the question prepared a statement of the answers he considered correct, it is not considered here. Neither is there any attempt required in the Directions to determine whether a given answer is more characteristic of the better principals than of the less effective principals.

The effect of this procedure is to perpetuate the conventional wisdom not only of the examiners but also, more significantly, of the candidates themselves, since the scoring key is derived in large measure from their answers. A more sound procedure for developing a scoring key would be to determine, or at least consider, the job behavior of the more and less successful principals.

4. Exhibit 1b to Rockowitz' affidavit, Guidelines for the Use of the Interview Test Rating Sheet, presents 21 scales on which the performance of the candidate is to be evaluated. Four scales come under the heading "Speech," eight under "Oral Discussion," four under "Interpersonal Relationships," and five under "Other Traits of Personality." Experts in test construction have found that it has generally proved difficult to make so many independent discriminations about interviewees; statistical analysis typically shows that scales such as "Comprehension of Problems" and "Comprehensiveness of Treatment of Problems" measure much the same thing. No analysis is presented to show how reliable or how interrelated the ratings are, nor which, if any, predict later success. It is therefore difficult to evaluate the procedure. It should be noted, however, that nowhere does the scale ask the overwhelming question. "How good a principal will this candidate be if he is placed in the position?"

5. Reference is made in this case to the concepts of validity, reliability, and objectivity. Some explication of these concepts is in order since there are inconsistencies and inaccuracies in the use of the terms by the experts of the Board of Examiners.

5a. Objectivity is used in two different senses in their affidavits. The first has to do with the notion that the test scores are not influenced by the scorer's knowledge of extraneous characterisitics of the candadate, e.g. race, ethnic origin, or previous history. Accepting information gleaned from these exhibits at face value, it appears that, where possible, the Board of Examiners takes the routine precautions.

The second sense in which the term is used requires that, for objectivity to obtain, adequate steps be taken to remove from the scoring procedure the personal predilections of the scorer. This can best be done by giving him a scoring key based on research that shows that some answers are better than others, i.e. that they are characteristic of better performers. The procedure outlined in Exhibit 1a, Directions for Formulating Standard Answers and Rating Directions, encourages the expression of one's own biases.

5b. Reliability is a measure of consistency. It is a necessary but not sufficient condition for acceptability of tests. A test or any other measure is reliable if independent measures of the same phenomenon tend to agree. Since no data are submitted on the reliability of the tests or interviews, it is not possible to tell if the reliabilities are satisfactory.

5c. Validity is classified into "criterion related validity" and "content validity" in Standards for Educational and Psychological Tests and Measures, American Psychological Assn. 1966 (a third type of validity, "construct validity," is not relevant to the discussion). The EEOC Guidelines and OFCC Test Order emphasize criterion related validity. Content validity is accepted when the determination of criterion related validity is not technically feasible. According to the Standards, "criterion related validity is domonstrated by comparing test scores with one or more external variables considered to provide a direct measure of the characteristic or behavior in question." A test has criterion related validity in this context to the extent that high scorers do better on the job. Except for one reference to a study of criterion related validity, characterized

by one of the defendant's experts as "modest," "exploratory," and "encountering a number of methodological snags," no report is made in the exhibits on criterion related validity.

The importance of the omission cannot be overstated. In the last analysis the only justification for the supervisory examination system is that through its use substantially better supervisors are selected than would be selected if their names were drawn from a hat.

(The statement in Exhibit 2b, an affidavit by Dr. Marvin Sontag, that "the decision to de-emphasize predictive validity was a wise one" because "It would take 20 years to collect an adequate sample of appointees for most licenses," and for other reasons, is contradicted by the whole literature of selection research. On the contrary, with, for example, 700 elementary school principals, the Board of Examiners is in an unusually favorable position to conduct meaningful research.)

The experts of the Board of Examiners rely heavily on content validity. Prof. Thorndike, in his affidavit, captures the essence of the concept when he says, "Proficiency tests . . . must be valuated in terms of the extent to which the aspects of knowledge and skill called for by the tests do in fact match aspects of knowledge and skill called for in the job for which they were designed."

Content validity can be determined only after a careful study. First, the job duties must be described in detail, with emphasis on the significant job behavior expected of the incumbent. Second, experts familiar with the job and with measurement identify some tasks as being important samples of the job behavior. Prof. Thorndike provides an example when he

writes, "Thus, a typing test in which a typist was called upon to transcribe a dictated letter from a tape accurately and with correct spelling and correct placement on the page would be classified as a proficiency test for a typist." Third, a means of observing, recording, and evaluating the performance is developed and examiners trained to use it. Fourth, the test is tried out on a sample to make sure that the task and observation scheme are reasonable, that evaluations are not unduly harsh or easy, and that independent observers achieve substantially the same results and other statistical standards are met. It is not sufficient to establish content validity to have outside experts compare test questions with a one or two page job description.

A field visit, in which the prospective principal is observed performing some of the duties of a principal would be content valid if the activities in the period observed were representative of the activities of a principal, if the observations were competently performed and if the report reflected his performance on significant aspects of the principal's duties. The claim of content validity for essay examinations about hypothetical situations would be only partially supported by demonstrating that the problem situation seems relevant to the job, and that the written answer is in line with the thought of qualified authorities. What remains to be seen is whether there is a correspondence between one's description of what he thinks should be done and what he actually does, or would do under the circumstances. It is well known that the columnists who give advice on investments are rarely millionaires. The case of the Board of Examiners would be immeasurably strengthened if they could show a correspondence between the written answers given on examinations and actual performance on the job. In the

absence of such evidence, the claim for content validity of the written test (or the interview) is not substantiated.

On the other hand, multiple choice tests of mathematics, grammer, current events, cultural knowledge and the like such as have been used in the past cannot be justified on the claim that they are content valid. They require criterion related validity, since they are obviously not intended to be job samples. The affidavit of Mr. Rockowitz seems to concede this, for the affidavit and supporting papers speak primarily to essay questions, and do not even claim content validity for the short answer questions.

Richard S. Barrett

RICHARD S. BARRETT

Sworn to before me this
5th day of November, 1970

Notary Public

NORMAN MANN
Notary Public, State of New Yo...
No. 31-2509750
Qualified in New York County
Commission Expires March 30,

Affidavit of William H. Enneis verified on
November 4, 1970

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

November 4, 1970

IN REPLY REFER TO:

Mrs. Elizabeth B. DuBois
NAACP Legal Defense and
Educational Fund, Inc.
Suite 2030
10 Columbus Circle
New York, New York 10019

Dear Mrs. DuBois:

My name is William H. Enneis. I live at 2810 Adams Mill Road, N. W., Washington, D. C. 20009.

I am employed as Staff Psychologist in the Office of Research at the U. S. Equal Employment Opportunity Commission, Washington, D. C. 20506. I have held this position since 1966 and have both extensive and intensive knowledge of minority employment problems created by employment tests and other personnel screening and evaluation procedures, such as interviews and examinations administered to assess eligibility for promotion to higher level jobs. I have written numerous papers and articles in the area of testing and minority employment.

I earned a doctorate (Ph.D.) in psychology, with industrial specialization, from Pennsylvania State University. I have done personnel measurement research for the U. S. Air Force and the U. S. Navy; and I taught courses in industrial psychology, personnel selection, interviewing, and test construction and validation at the University of Georgia for four years. I am currently a member of the

U. S. Department of Labor Advisory Committee on United States Training and Employment Service Tests, and I am also a consultant on a nation-wide test validation program funded by the Urban Mass Transportation Administration, U. S. Department of Transportation.

The opinions that I express in this letter are my own and do not necessarily reflect those of the Equal Employment Opportunity Commission or the U. S. Government.

I have read the sworn statements of Richard S. Barrett, Aaron Suss Carton, Esin Kaya Carton, Murray Rockowitz, Marvin Sontag, and Robert L. Thorndike in the case of Boston M. Chance & Luis C. Mercado, et al. v. Board of Examiners, et al. concerning the use of written and oral examinations in screening candidates for the positions of assistant principal and principal in the school system of New York City.

My comments are listed below.

1. Apparently, the Board of Examiners base their rationale for the use of these qualification tests on the idea that the tests have content validity. It is also equally apparent to me that no studies have been conducted to show the relationship between these qualifying examinations and actual performance of duties as assistant principal or principal, although it is highly desirable and certainly within the realm of feasibility to conduct predictive validity studies of this nature. The establishment of content validity for a test may be an admirable first step, but it should not be viewed as a substitute for predictive validation when the predictive approach is feasible.

2. The claim of content validity of any test designed to assess candidates' qualifications for a certain type of work must be supported by carefully conducted job analyses on both the frequency and importance of duties associated with the positions for which the tests are administered. These detailed job analyses are required so that examination items can be prepared which proportionally reflect both the frequency and importance of the job duties. The job analyses should be conducted by independent persons trained in this activity (job analysis); otherwise, the results may be seriously biased by self-reports (questionnaires) which are completed by the incumbents (assistant principals and principals). The reason for this potential bias is that many employees in administrative positions tend to report as <u>important</u> those work aspects which they most enjoy or those which they do well. Also, the <u>frequency</u> of reported job functions may be influenced by the extent to which the incumbent prefers to do them. Therefore, some critical components of the job may be slighted, even though they are matters of the greatest concern for teachers, pupils, the community, and the school system.

3. I raise the serious question as to whether the examinations, as presently conducted, have sufficient statistical reliability to warrant their use. In this connection, I would be especially concerned about how much <u>independent</u> agreement there is between two or more persons who are grading the same answers to the essay questions or responses in the oral interview. If two or

more raters do not agree well on their evaluation of candidates' responses, the examination will have low reliability. Who then is to say which candidate is "better" than another candidate? This inter-rater type of agreement is the most fundamental and the easiest type of reliability to establish for the essay and interview parts of the examination. I reject the necessity for "test-retest" reliability studies at this point in time because if there is relatively low agreement among independent judges with respect to answers from <u>one</u> set of examination questions, there is likely to be even less correspondence of agreement between two sets of scores on alternate forms of the test. I agree with Aaron Carton, who says that the "test-retest" procedure would be unduly arduous, but I go further and state that at this stage of the process the test-retest method is probably unnecessary.

I note that several references to the reliability of this examination never contain the <u>degree</u> of this reliability. I find this odd because professionals and experts usually substantiate and document their statements when asserting a fact of this nature, especially when the issue (reliability) is so critical to the defense of the examinations in question.

4. I note repeated references in the sworn statements as to the "objectivity" of the essay examination and the interview in this evaluation process. Standardization of the construction and administration of the examination (written and oral parts)

and detailed instructions on scoring do not turn a subjective method into an objective one. When a person or a group of persons makes judgments, including those of a quantitative nature, about the adequacy of written and/or oral responses of another person, the judgments are necessarily subjective. Even anonymity of the candidates does not remove the inherent subjectivity of the evaluation process. Therefore, I find the statements on the "objectivity" of these parts of the examination to be grossly incorrect and misleading.

5. On many written tests minority groups suffer from lower scores that bar them from good, productive, responsible work while no evidence exists that they will do less well on the jobs for which they were tested. I am firmly convinced that equitable selection procedures can play a large role in nondiscriminatory employment. However, this equity cannot masquerade under the false front of "objectivity." Furthermore, an objective procedure is not necessarily fair, and a fair procedure does not have to be objective.

The fairness of an employee selection procedure resides in its application and the effect its use has on employment opportunities for persons of various racial, ethnic, and national origin backgrounds. An employment or an assessment procedure for promotion that screens out a disproportionately

high number of candidates of a particular race or national origin and has no demonstrated job-relatedness cannot be considered fair, regardless of its real or claimed structural objectivity and the "good faith" in which it is purportedly used. An inadequately validated selection procedure does not permit anyone to say that an applicant is either qualified or unqualified to perform satisfactorily on a given type of job.

Sincerely yours,

William H. Enneis

William H. Enneis
Staff Psychologist
Office of Research

WHE:wmc

Washington, D.C. ss

Subscribed and sworn to before me this 4th day of November, 1970,

Louis T. Darke
Notary Public

My Commission expires Nov. 1, 1974.

Affidavit of David Rogers verified on
November 5, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated,	
Plaintiffs,	CIVIL ACTION
v.	70 Civ. 4141
THE BOARD OF EXAMINERS, et al.,	
Defendants	

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

DR. DAVID ROGERS, being duly sworn, deposes and says:

1. I am a Professor of Sociology and Management in the Graduate School of Business Administration of New York University. I received a doctoral degree in sociology from Harvard University in 1960.

2. From 1965 to 1967, I held the positions of Research Associate and Senior Research Sociologist at the Center for Urban Education, a research and development laboratory chartered by the New York State Board of Regents and set up under a grant from the United States Office of Education. During that period I conducted a study of the New York City public school system. This study formed the basis for an extensive report on the New York City school system which culminated in a book published by Random House, Inc. (New York) in 1968 under the title 110 Livingston Street -- Politics and Bureaucracy in the New York City School System. I am now engaged in updating this study to cover the period from 1968 to date. This updating includes a continued analysis of the Board of Examiners.

3. My investigation included a study of the workings of the Board of Examiners and of the examination system that it administers for teachers and supervisors in the school system.

4. In the course of gathering data and material relevant to the Board of Examiners and said examination system, I and my research assistants had occasion to interview at length and on numerous occasions several members of the then Board of Education, several members of the professional staff at headquarters, including some who did extensive research for the lay Board of Education on the Board of Examiners, and several members of the Board of Examiners itself. In addition I conducted extensive interviews with outside researchers who had studied the Board of Examiners.

5. Throughout this investigation and these interviews, I endeavored to discover whether any systematic attempt had ever been made to validate the examinations -- that is, to analyze them to determine whether scores on them were in any way related to future job performance. At least one member of the Board of Examiners acknowledged that no such attempt had ever been made, although it was conceded that such analyses were needed. One explanation given was that money had never been available for such research. Indeed, a former member of the Board of Examiners who retired in the mid 1960's reported in an interview two years later that the greatest weakness in the examination system is that millions are spent on exams, but that the Board of Examiners has no research staff. A social scientist who had studied the examination system concurred with this judgment and concluded that the Board of Examiners did not have the technical competence to validate the exams.

An important obstacle to validating the exams is that the educators have not yet developed any agreed-on performance

standards. This is not an insurmountable task from a technical point of view, but it is very difficult politically. Many social scientists are agreed that the educators' resistance to being held accountable for pupil performance is a critical political obstacle.

6. My continuing studies indicate that no systematic validation studies have been done since 1968. Board of Education members who were actively involved in personnel matters reported in 1969 that they never received any materials from the Board of Examiners about any validation studies. They indicated to me that to their knowledge there are no such studies.

7. I also investigated the extent to which the assistant principal and principal exams discriminated against racial minorities. There are no systematic data on this, but there are indications of the examinations' discriminatory effect. Thus, many black educators in New York City cited cases to me of themselves or other blacks being failed on the speech exam for "Southernisms". I have no precise evidence on how prevalent this was and how recent. Also comparative statistics indicate that New York City has one of the lowest representations of blacks at supervisory levels of any inner city school system in the nation.

Members of the Board of Examiners and other school officials often say that few blacks took the exams until recently. This is, of course, true, but not mainly or solely for the reasons the educators give -- namely, that there are few who are qualified. Numerous interviews with black educators in New York indicate that many of their colleagues in the city and throughout the nation have hesitated to take the New York City examinations lest they be failed and, in their estimation, humiliated, like others before them. The educators' tendency to externalize the blame and their failure to understand this psychology of despair have led to very

one-sided interpretations of the phenomenon. Exams for supervisors in the New York City school system have had a chilling or "freezing out" effect on blacks (as well as Puerto Ricans), contributing to the tremendous under-representation of these groups today. The Board of Examiners must be held accountable for that, since they function autonomously and have almost exclusive domain over the exams.

Dr. David Rogers

DR. DAVID ROGERS

Sworn to and subscribed
before me this 5th day
of November, 1970.

Marjorie H. Doswell

Notary Public

MARJORIE H. DOSWELL
NOTARY PUBLIC, State of New York
No. 03 [illegible]
Qualified in Sussex County
Commission Expires March 30, 1972

Affidavit of Gregory G. Jones verified on
November 6, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated, Plaintiffs, v. THE BOARD OF EXAMINERS, et al., Defendants.	CIVIL ACTION 70 Civ. 4141

AFFIDAVIT IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

GREGORY G. JONES, being duly sworn, deposes and says:

(1) I am a third-year law student at Columbia Law School and am Managing Editor of the Columbia Journal of Law and Social Problems. Over the past 10 months I have conducted a study of the examination procedures of the Board of Examiners and have reported my findings in the article, Discriminatory Merit Systems: A Case Study of the Supervisory Examinations of the New York Board of Examiners, 6 Columbia Journal of Law and Social Problems 374 (1970) (submitted separately as Exhibit 1 hereto).

(2) I have examined the papers submitted by defendants in opposition to plaintiffs' motion for preliminary injunction including in particular the affidavit of Jay E. Greene, the affidavit of Murray Rockowitz and exhibits 1, 1a, 1b, 2a, 2b, 2c, 2d, 3, 4a, 4b, 4c and 5 attached thereto, and I submit this

affidavit in response to those papers and in support of plaintiffs' motion.

(1) Jay Greene asserts in paragraph 3 that the statistics cited in plaintiffs' Amended Complaint (par. 20), indicating in Mr. Greene's words "that there is a low percentage of black and Puerto Rican supervisors in the New York City school system" are irrelevant on the question of the alleged discriminatory impact of the Board's examination procedures. In support of this assertion he first states that "the Board of Examiners does not determine the eligibility requirements for applicants for supervisory positions . . . [a]ccordingly, the recitation of statistics concerning the percentage of blacks and Puerto Ricans among the total number of licensed supervisors, is irrelevant to these proceedings." (par. 3) This statement ignores the fact that for almost two decades it has been the examination procedures not the eligibility requirements that have triggered the harshest criticisms by respected students of the system. Citation to only a few of the most respected of these studies illustrates the point: 2 Mayor's Committee on Management Survey, Administrative Management of the School System of New York City 755 et seq. (1951)(Strayer and Yavner); D. Griffiths, et al., Teacher Mobility in New York City: A Study of Recruitment, Selection, Appointment, and Promotion of Teachers in the New York City Public School 63-65, 100, 116-27, 162-225, 230 (1963)(Griffiths Study); Mayor's Advisory Panel on Decentralization of the New York City Schools, Reconnection for Learning: A Community School System for New York City 448, 111 n. 28 (1967)(Bundy Report); D. Rogers, 110 Livingston Street 285-297 (1967). See also M. Schinnerer, A Report to the Commissioner of Education, State of New York, 48-57 (1961) and Cresap, McCormick & Paget, Summary Report of Assignment Conducted for the New York City Board of Education (1962). In D. Rogers, 110 Livingston Street 285-97 (1967) there was a particular focus on the suspicion that the examinations may work to the peculiar disadvantage of minority groups.

(4) In paragraph 4 of his affidavit, Mr. Greene states that: "If statistics have any relevancy in determining the claim of discrimination, the only meaningful statistic would be a comparison of the pass-fail ratio of black and Puerto Rican applicants." It is quite true that one significant kind of statistic would be that indicating the number of blacks and whites who took a particular examination and the percentage of each group that passed. I time and again asked interviewees during the course of my research for just these figures. However, I was told repeatedly, most notably by defendant Murray Rockowitz and by Mrs. J. Luisette, Assistant to (former) Chairman of the Board of Examiners, Jay Greene, that no such data was available. Yet Mr. Greene reported in the Board's 1968-1969 year-end report that "...the number of minority group applicants in supervisory examinations has increased substantially...." (Exhibit 2 par. 9). And Mr. Greene in his affidavit cites to statistics indicating the race of applicants for a few examinations which are curiously favorable only to defendant's position (See Greene affidavit par. 5 at 3).

Mr. Greene also refers in par. 6 to the small number of "eligible black and Puerto Rican applicants" and seeks to explain the relative paucity in pars. 6 and 7. He fails, however, to mention a factor reported to me in an interview with Mr. Frederick H. Williams, Assistant Superintendent, Office of Personnel, who is in charge of recruitment for minority group educators. Mr. Williams said that he believed the examinations themselves explained in part the relatively unsuccessful efforts to recruit black and Puerto Rican applicants for supervisory positions.

5) Mr. Rockowitz in his affadavit at par. 21 and in Exhibit 5 asserts that the article I wrote is "replete with false statements, misquotations and other inaccuracies." A careful review of my rather lengthy notes of the interview, on March 24, 1970 in Mr. Rockowitz's office, indicates no inaccuracies whatever. Moreover, a careful review of his allegations with respect to statements in my article indicates that he challenges very few factual statements, but rather argues with certain conclusions that I drew. In addition, I might add, he complimented me for coming to the interview well prepared in terms of my understanding the Board's procedures and the basics of testing procedures in general. Finally, I should say as an introductory remark that Mr. Rockowitz was quite well aware that I was a staff member of the Journal and that the interview was for publication in the article I subsequently wrote. I will not take the time to refute the more petty of his allegations, but will comment only on those of his assertions that are relevant to these proceedings.

(6) Mr. Rockowitz disputes the accuracy of my article with respect to the Board's efforts at job analysis, the general adequacy of research efforts by the Board, the competence of "examination assistants" who actually construct the tests, and the validation efforts by the Board.

Job Analysis Efforts by the Board

(7) A job analysis is the first step in test development. To conduct a successful analysis the researcher must have a wide background in psychology and the analysis must be specific and in detail. If properly done, such an analysis yields a description of the major activities of the position and their relative importance and in addition indicates what kind of performance or personal or professional characteristics make for success on the job. L. Cronbach, Essentials of Psychological Testing, 407 passim (3rd Edition, 1970).

(8) Mr. Rockowitz asserts at par. 10 of his affadavit and at par. 3 of Exhibit 5 attached thereto that "there is a systematic empirical analysis for each position for which the Board of Examiners conducts tests," but cites only to the "duties of position" (see Exhibit 3 of Rockowitz affidavit) as evidence of these analyses. In our interview, Mr. Rockowitz said that the "duties of the position" were accepted "a priori" as criteria of job success and indicated unambiguously that this was not a desirable practice. He said that prior to the plan he refers to in par. 4 of Exhibit 5 there was never any systematic research into criteria of job success. Rockowitz said that the stimulus for the proposal was the passage of the 1967 Amendment to the New York Education Law which requires the Board to periodically review the validity and reliability of the examination and examination procedures.

(9) Similarly, in an anonymous interview with a senior official at the Board of Education, who for obvious reasons wishes to remain anonymous, I was told that while formally it is the duty of the Board of Education to establish the "duties of position" in practice, requests are sent to incumbents of the position who list "duties," based on their personal opinion, which are "frequently accepted verbatim." The Board's research efforts were characterized as "haphazard" and as a "big empty area." In fact, the official told me that he personally participated in drawing up the "duties" for the examination which he himself was scheduled to take.

Absence of Research

(10) Explaining the relative absence of such basic research by the agency formally dedicated to that goal, Rockowitz said the "Board is research starved." Elaborating, he said that prior to 1967 there had been no more than one permanent staff researcher employed at any one time in the entire history of the Board. Rockowitz said further that "no examiner was assigned to research per se until 1967," (at which time Rockowitz himself was so assigned), although prior to 1967 there was a "Research Associate," Dr. Gerhard Lang.

(11) Mr. Rockowitz said he increased the permanent research staff to tw Dr. Dena Titlebaum and Mr. James Lee. Rockowitz also said, however, that although he has been assigned to research, he still has many administrative duties as well.

(12) Mr. Rockowitz blamed principally the Board of Education for the relative basic absence of research by the Board of Examiners. He summarized this criticism in the following quote, authorized for publication: "Funds have not been available over the years for a sufficiently comprehensive ongoing program of research." This quote is cited in my article (see Exhibit 1 at 386). Mr. Rockowitz said further that there was "no real philosophy of research at the Board" since the development of such a philosophy was precluded by the fact that the Board was flooded with the burdens of administering tests.

(13) Yet now Rockowitz asserts at par. 16 that:

> "...the Board of Examiners has regularly conducted research in an effort to improve its testing procedures. Such research has been carried on for many years and is incorporated in numerous published and unpublished reports."

and similarly at par. 13 of Exhibit 5: "The Board of Examiners has had a Research Committee and a Research Associate for many years." (emphasis supplied)

(14) Mr. Rockowitz's assertions ignore the crucial fact stated quite clearly in a 1966 Board study which Rockowitz seems to cite in his Exhibit 5 at 8 (7.) as evidence of a Board of Examiners validity study:

> "...[I]t has been a source of dissatisfaction to [the Board] to note the repeated difficulties in obtaining a research staff to embark on the fundamental problems of studies of validity and reliability of procedures. It is, furthermore a source of chagrin to note that the problem of selection of school personnel has been under-investigated, despite its patent significance in an era which so acknowledges the importance of education....
>
> In an effort to turn attention to the problem of selection of school personnel, the Board of Examiners has undertaken the study, now being prefaced. The first question to be asked is: 'How do large school systems select their personnel?' This is a necessary preliminary to the more fundamental, more difficult questions involving evaluation of procedures, which eventually must be posed." H. Gilbert, I. Bogden, G. Lang, Kalick, Teacher Selection Policies and Procedures in Large Public School Systems in the United States iii (1966). (emphasis supplied)

Obviously, this study which is on file at the Columbia University Teachers College Library, is not a validity study, but simply what its title indicates: a compilation of the selection procedures of other large school systems. A citation to this study does indeed appear in my article at 386 n. 104, but clearly not in a self-contradictory manner.

Training of "Examination Assistants"*

(15) The extent to which "examination assistants" assigned to the Board have professional training in test construction, design, measurement, and statistics is crucial, for they are the personnel who are heavily relied upon to actually construct the tests that constitute a particular examination.

Mr. Rockowitz at page 3 (6) of Exhibit 5 asserts:

> "Those assigned to the Board's staff as assistant examiners in fact have had wide experience in the construction and administration of tests. In addition, they are trained through comprehensive briefing sessions and detailed written guidelines in the construction of test items."

in response to the statement in my article that:

> "...[I]t has been conceded that those assigned to the Board's staff as 'examination assistants' have had no experience whatsoever in professional test construction. Understanding the principles of professional test development simply has not been one of the requirements for the job."

(16) In my interview Mr. Rockowitz said that the "subject matter experts in the field" (not test experts) submit questions and answers which the "examination assistants" assigned to the Board "review" and "edit." In a subsequent interview, also on March 24, 1970, with Mrs. J. Luisette, who served as an "examination

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*It is a matter of indifference to me whether Mr. Rockowitz wishes to label as "examination assistants" or "assistant examiners" those persons actually assigned to the Board to construct the tests for examinations. What is crucial about the personnel who perform this function is discussed above in pars. 16-17. Nevertheless, I might say that, in point of fact, it appears that the latter are merely a subgroup of the former, although the former group also includes "subject matter" experts from outside the system who as a practical matter would not be assigned to the Board as "assistant examiners."

assistant" assigned to the Board for eight years (until 1968) and who was serving at the time of the interview as Assistant to (former) Chairman of the Board of Examiners, Jay Greene, I was told that the "review" and "edit" process consisted principally of "proofreading." I repeatedly asked Mrs. Luisette whether professional test experience was a condition to employment as an "examination assistant." She responded negatively without hesitation on each occasion. I then asked Mrs. Luisette what then were the criteria by which "examination assistants" were selected. In answer to my question Mrs. Luisette gave me a copy of "Summary of Meeting with CSA [Council of Supervisory Associations]: 'Selection and Assignment of Examination Assistants.' (Dec. 29, 1969) (attached as Exhibit 3). Among the participants at the meeting was defendant Unser, then Vice Chairman of the Board of Examiners. The following quotes from the Summary illustrate rather conclusively that professional training in test construction is not a condition to employment as an "examination assistant":

> "Current practice is to select persons on the basis of their educational background, professional experience, reliability, integrity, judgment, and personality. . . . The qualifications of potential assistants are evaluated by study of their personnel files and by checking with supervisors or colleagues.
>
> "1. The Board of Examiners has been considering some more formal way of testing the qualifications of persons who wish to serve." (emphasis supplied)

(17) Mrs. Luisette said she actually "constructed" the tests for a number of examinations. The only guidelines in test construction she said she received were mechanical instructions indicating, for example, that questions should be typed on the opposite side of the card from the answer. According to Mr. Rockowitz, the Board has just recently begun providing "examination assistants" with item analyses of the short-answer questions for certain examinations.

Validation

(18) The most crucial stage in test development is validation. In this connection Rockowitz at p. 6 of Exhibit 5 asserts:

> "The Board of Examiners has complied with the New York State Education Law by reviewing the reliability and validity of its examinations in 22 separate studies since the Law was enacted."

Evidently in these purported studies, the Board has stressed content validity rather than predictive validity (criterion-related validity). The latter is preferred by test experts in validating personnel selection and classification procedures, see e.g. L. Cronbach, Essentials of Psychological Testing, 107 (3rd Edition, 1970), A. Anastasi, Fields of Applied Psychology, 28 (1968) and is emphasized by the EEOC and required by the OFCC whenever feasible. The cites to EEOC guidelines and Executive Order pertinent to the OFCC may be found in my article at 382 n. 69 (see Exhibit 1).

(19) Mr. Rockowitz cites in support of his claim of 22 reliability or validity studies only a few "summaries" of purported validity studies in Exhibit 4c and in addition he cites an unpublished predictive validity study at par. 16, p. 9 of his affidavit.

During that part of our interview in which we discussed the Board's efforts to validate its exams, Rockowitz made no mention of content validity studies. He stated quite unambiguously that the Board had not run any empirical predictive validity studies on the exams. He did say that the Board was preparing item analyses of the short-answer tests through the efforts of Mr. Lee and Dr. Titlebaum and that the Board applied face validity analysis to the exams. Item analysis has no direct bearing on the validity of the exams, and test experts assert that face validity is an unacceptable substitute for either content validity or predictive validity. (See Exhibit 1 , at note 90 and accompanying text)

In this connection I asked Mr. Rockowitz about the Board's "pilot" predictive validity study reported in the following manner in the Board's 1968-1969 year-end report:

> "Research activities with a limited research staff included a pilot study of the relationship between our examinations and success on the job as principal...." (See Exhibit 2 , p. 2, par. 13)

Rockowitz said that the study was cancelled because of an insufficient population as a source of criteria for success, that is, an insufficient population of those who could rate on the job performance of principals. Rockowitz said there was only a population of one, the Field Superintendents, whose ratings for various reasons proved inadequate.

Mr. Rockowitz now maintains the study was completed, though unpublished. It is significant, however, that in the view of defendants' expert the study was "modest" and "exploratory" in scope and "encountered a number of methodological snags." (Exhibit 2c at 5 attached to affidavit of Rockowitz).

Mr. Rockowitz quite frankly conceded in the interview that he did not know how valid the exams were and that theoretically they could arbitrarily exclude qualified applicants and admit unqualified applicants.

Gregory G. Jones
GREGORY G. JONES

Sworn to before me
this 6th day of
November, 1970.

Marjorie H. Doswell

MARJORIE H. DOSWELL
NOTARY PUBLIC, State of New York
No. 03-[illegible]
Qualified in Bronx County
Commission Expires March 30, 1972

Affidavit of Stanley Taylor verified on
October 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and
LOUIS C. MERCADO, et al.,

Plaintiffs,

v.

BOARD OF EXAMINERS, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Mr. Stanley Taylor, being duly sworn, deposes and says:

1. I am the Community Superintendent of School District 13 in Brooklyn, which includes the Bedford-Stuyvesant and Fort Greene area. My experience as an educator prior to becoming Superintendent of Community School District 13 consists of: Principal of J.H.S. 294K District 13, Intern Principal of J-117K, Internship at Fordham University, Assistant Dean of Sheepshead Bay High School, Acting Chairman of Health Education in J.H.S.'s, Administrator of School Lunch Programs, Safety Programs, Administrator of High School Cross Country Track Team as well as Administrator of Interior of School Traffic Programs, Administrator of Summer Programs in Continuing Education, Principal of Summer Day Elementary School, all in New York City.

2. Of the 25,509 students who attend school in District 13, approximately 73.7% are black, 21.8% are Spanish-speaking, and 4.5% are white.

3. Three vacancies have existed for the position of principal since I became Superintendent. Each candidate for these positions has

been examined by me, the District Board and by the parents' association in the school affected. Careful consideration was given to a defined set of qualifications, including:

(a) Human qualities, such as leadership, reliability, stamina, sensitivity, the ability to work under pressure and to make decisions.

(b) Fundamental attitudes - are they positive, innovative, and energetic?

(c) University education, including whether the person has the appropriate State certificate.

(d) Practical experience in education, especially experience with Black and Spanish-speaking students.

(e) Acceptability as a member of the community.(Does the candidate reside in the community? Does the candidate speak Spanish?)

(f) Administrative capabilities.

(g) Comprehension of community problems and aspirations.

4. Regardless of whether the candidate was on the supervisory list, we found it necessary to ascertain to our own satisfaction that he or she met the criteria listed above keeping in mind that we were seeking the best person for a particular school in our district.

5. It was my experience that those from the list did not uniformly display greater competence than other candidates, and I believe that mere passage of the test is no assurance of appropriate qualifications. The examination procedure does not seem to measure any significant differences, nor to be correlated to judgment and the ability to perform on the job.

6. As a result of our screening process, we appointed one Asst. Principal from the supervisory list, and three Principals not from the list.

7. The Principals not from the list are performing exceptionally well; they seem to function as well as and in some instances better than other Principals in the District.

8. The net result of the examination seems to be that the number capable persons from minority groups on the list is severely limited. My explanation for this is two-fold. First, it is my belief that there is a certain amount of inbreeding in the selection process since the Assistant Examiners have evidently been trained in the techniques of writing sterile non-relevant answers to hypothetical questions and presumably require the same from candidates. Second, it is my understanding that minority candidates believe that no more than a select few have an opportunity to pass;

hence, many do not deem it worthwhile to submit to the process.

9. It is my belief that if this type of examination were to be the yardstick for selecting the administrative leaders of the '70's our schools could not progress toward the changes that are necessary. We would lose doubly because the number of talented Black and Spanish-speaking school administrators would be kept to an abnormal minimum.

Stanley Taylor

Stanley Taylor
Community Superintendent of School
District 13

Signed and Sworn to before me
this 23RD day of OCTOBER, 1970.

Moe Korenman

Notary Public

MOE KORENMAN
Notary Public, State of New York
No. 24-7338700 Qual. in Kings Co.
Commission Expires March 30, 1972

Amended (second) Complaint filed on
February 23, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, CLARA BURGESS, FAITH RINGGOLD, SHIRLEY RANDALL, MARIA C. CESTERO, EDWARD BONNEMERE and MARIA SANTOS, individually and on behalf of all others similarly situated,	
v.	
THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and FREDERICK H. WILLIAMS, individually and in his capacity as Executive Director of the City School District of the City of New York.	CIVIL ACTION No. 70 Civ. 4141 AMENDED COMPLAINT - CLASS ACTION

JURISDICTION

1. This is a civil action brought under Title 42 U.S.C. §1981 providing for the equal rights of citizens and of all persons within the jurisdiction of the United States; Title

42 U.S.C. §1983 to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States; Article 5 §6 of the New York State Constitution and §2590-j 3 (a)(1) of the New York Education Law, requiring that merit and fitness, as determined by examinations, be the basis for appointments and promotions in New York City public school system; §2569(1) of the N. Y. Educ. Law guaranteeing the validity and reliability of examinations and examination procedures in the New York City public school system; and §2573(10) of the N.Y. Educ. Law vesting in the Board of Education of the City of New York exclusive authority to establish the academic and professional qualifications for the City license of principal and of certain other positions, to enjoin violations thereof. Plaintiffs also seek a declaratory judgment pursuant to Title 28 U.S.C. §2201. The matter in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars ($10,000.00). Jurisdiction is conferred on this Court by Title 28 U.S.C. §§1331 and 1343(3).

CLASS ACTION ALLEGATIONS

2. Plaintiffs bring this action in their own behalf and as a class action pursuant to Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The class includes all those who (1) have failed supervisory examinations for which eligibility lists are to be published or are eligible to take supervisory examinations to be given in the future and (2) are members of minority groups who suffer from cultural disabilities imposed by historical patterns of educational and social discrimination or

are untutored in the esoterics of test-taking in the New York City school system.

3. It would be unduly burdensome and impractical to enumerate exactly the members of the class; however, a rough approximation indicates the number to be in the thousands. Deputy Chancellor Anker has indicated that the blacks and Puerto Ricans eligible for merely one supervisory examination scheduled for the fall (the elementary school principals' examination) number somewhere between three and four hundred. New York Times, July 24, 1970. On information and belief, fourteen additional supervisory examinations are presently scheduled for 1970-71, suggesting the existence of several hundred more eligibles from minority groups. Furthermore, on information and belief, a number of eligibility lists established pursuant to supervisory exams already given are about to be published, indicating the existence of additional members of the class, numbering in the hundreds.

4. Plaintiffs are members of the class: both plaintiffs are eligible to take a supervisory exam scheduled in the future (the elementary school principals' exam) and both are members of culturally disadvantaged minorities (Mr. Chance is black and Mr. Mercado is Puerto Rican).

5. The members of the class, numbering in the thousands, are so numerous as to make joinder impracticable.

6. Clearly, there are questions of law or fact common to the class. The alleged discrimination in violation of the Fourteenth Amendment has a similar negative impact on the interests of each member of the class. Administration of unvalidated exams in violation of the provisions of N.Y. Educ. Law §§2569(1), 2590-j 3(a)(1) and of Article V, Section 6 of the New York State

Constitution obviously will have a particularly onerous impact on the class describ[illegible]n Paragraph (2) supra. In addition, the existence of common questions of law or fact is implicit in a finding that the class action satisfies the requirements of F.R.C.P. 23(b)(1) or (2).

7. The claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class. It is obvious that the named plaintiffs share the issues and interests of the absentee members of the class. All members of the class are barred from permanent supervisory positions in the school system because they have no license. Both the named plaintiffs and unnamed members of the class are members of minority groups who are eligible to take supervisory examinations, all of which are alleged to be discriminatory, invalid and otherwise in violation of the law. There is no suggestion of any antagonistic interests among members of the class. It is equally obvious that both named plaintiffs intend to prosecute the interests of the class vigorously. Both clearly desire permanent supervisory positions. Both Mr. Chance and Mr. Mercado are presently serving as acting principals; both are eligible for the position of principal, elementary school except that they do not possess the requisite license; Mr. Chance has taken and failed one previous supervisory examination. Thus, it is clear that the intense commitment of the named representatives to the goal of declaring invalid and enjoining the present system of examining and licensing supervisory personnel in the school system is unassailable, and that this goal is coextensive with the interests

of the other members of the class.

PARTIES

8. Plaintiff Boston M. Chance, who has been employed in the pedagogical service of the New York City public school system for the past 15 years, is black, holds a New York State principal's certificate, and is acting principal of Public School 104, an elementary school in the Bronx. Plaintiff Chance possesses all the educational and experience qualifications established by law and by the Board of Education and the Chancellor of the New York City School District for the position of principal, elementary school. He is barred at present from being appointed permanent principal because he does not have a New York City license as elementary school principal.

9. In September, 1968, plaintiff Chance took the examination conducted by defendant Board of Examiners for the position of Assistant Principal, Jr. High School. He failed to pass that examination and therefore was not on the eligibility list established July 15, 1969, for said position, and was not issued a license entitling him to permanent appointment in said position.

10. Plaintiff Louis C. Mercado, who has been employed in the pedagogical service of the New York City school system for 12 years, is Puerto Rican, holds a New York State principal's certificate, and is acting principal of Public School 75, an elementary school in Manhattan. Plaintiff Mercado possesses all the educational and experience qualifications established by law and by the Board of Education and the Chancellor of the New York City School District for the position of principal, elementary school. He is barred at present from receiving appointment as permanent principal because he does not have a New York City license as

elementary school principal.

10a. Plaintiff Clara Burgess, a resident of the City of New York, is black. She has been an employee of the New York City public school system for seventeen (17) years, and is presently Evaluator of Head Start Programs for Community School District 7. Plaintiff Burgess holds state certification for elementary school principal, and is a candidate in the most recent examination for the New York City license of elementary school principal, the written portion of which was given on November 3, 1970.

10b. Plaintiff Faith Ringgold, a resident of the City of New York, is black. She has been an employee of the New York City public school system for fifteen (15) years, and is presently a teacher of art at Brandeis High School. She is also a lecturer in art at Bank Street College and Wagner College. Plaintiff Ringgold failed the examination of defendant Board of Examiners for the New York City license of supervisor of art which commenced in March, 1968.

10c. Plaintiff Shirley Randall, a resident of the City of New York, is black. She has been an employee of the New York City public school system for fifteen (15) years, and is presently a teacher of retarded children at the Bronx Occupational Training Center, a facility of defendant Board of Education. Plaintiff Randall is a candidate in the most recent examination for the New York City license of Supervisor in the Bureau of Children of Retarded Mental Development, the written portion of which was given in June, 1970.

10d. Plaintiff Maria C. Cestero, a resident of the City of New York, is Puerto Rican. She has been an employee of the New York City public school system approximately fourteen (14) years

and is presently acting principal of Public School 120, an elementary school in Brooklyn. Plaintiff Cestero holds state certification for elementary school principal. She failed the examination of defendant Board of Examiners for the license of Assistant Principal of Junior High School which commenced in September, 1968 and is a candidate in the most recent examinations for the New York City licenses of Elementary School Principal, the written portion of which was given November 3, 1970, and for Administrative Assistant of High School, the written portion of which was given December 29, 1969.

10e. Plaintiff Edward Bonnemere is black. He has been an employee of the New York City public school system for fifteen (15) years, and is presently a teacher of music at Intermediate School 55 in Brooklyn. Plaintiff Bennemere failed the examination of defendant Board of Examiners for the New York City license of Chairman of Music for Junior High School, commenced in or about 1966.

10f. Plaintiff Maria Santos, a resident of the City of New York, is Puerto Rican. She has been an employee of the New York City public school system for seventeen (17) years, and is presently Coordinator for the study of English as a second language for Community School District #9 in the Bronx. Plaintiff Santos holds state certification for secondary school principal. She failed examinations of defendant Board of Examiners for the New York City licenses of Junior High School Chairman of Foreign Languages and Senior High School Chairman of Foreign Languages, administered in or about 1966.

11. Defendant Board of Education exists pursuant to the laws of the State of New York (N.Y. Educ. Law §§2552 and 2590-b) and is declared by law to be a body corporate (N.Y. Educ. Law §2551). Said Board of Education is empowered and required, inter alia, to establish and maintain such free elementary and other schools as it deems necessary to meet the needs and demands of the City of New York (N.Y. Educ. Law §2554(9)); and to designate the academic and professional qualifications required for the license of principal and of certain other positions (§2573(10), N.Y. Educ. Law). Defendants Murry Bergtraum, Isaiah E. Robinson, Jr., Mary E. Meade, Seymour P. Lachman, and Joseph Monserrat, constitute the membership of defendant Board of Education. Their terms extend to July 1, 1971.

12. Defendant Chancellor Harvey B. Scribner is chief administrative officer of the City School District of the City of New York and functions pursuant to §2590-h of the N.Y. Educ. Law. Said Chancellor is empowered and required, inter alia, to promulgate minimum education and experience requirements for all supervisory service positions (N.Y. Educ. Law §2590-j(2)).

13. Defendant Deputy Superintendent of Schools Theodore H. Lang is the chief personnel officer of said school district.

14. The Defendant Board of Examiners exists pursuant to the laws of the State of New York, discharging governmental functions (N.Y. Educ. Law §2569(1)). Said Board of Examiners is empowered and required, inter alia, to prepare and administer examinations to determine the merit and fitness of applicants for New York City teachers' and supervisors' licenses (N.Y. Educ. Law §2590-j(3)(a)(1)). Defendants Gertrude E. Unser, Jay E. Greene, Murray

Rockawitz and Paul Denn are members of said Board of Examiners.

FACTUAL BACKGROUND

15. The New York City public school system is composed of 916 schools, and has a pupil population of 1,123,165 that is 33.6% black and 22.2% Puerto Rican. Said system employs approximately 937 principals or others in charge of schools, 1,851 assistant principals and administrative assistants, 943 department chairmen, 1,465 guidance counselors and 62,891 day teachers.

16. In order to obtain a permanent appointment to any supervisory position, an individual needs an appropriate New York City license (N.Y. Educ. Law §§2569, 2590-j(1), (4)b, (4)d). Such licenses are issued by defendant Board of Education only to persons who meet qualifications that it and the Chancellor have established as required by law, and who have passed an examination procedure prepared and administered by defendant Board of Examiners. These licenses are in addition to state requirements for supervisory positions. Of all the school districts in the State, only the City School District of the City of New York maintains a Board of Examiners and this specific examination and licensing procedure. Indeed the only other school district in the state in which the law provides for examinations in addition to state certificate is Buffalo. N.Y. Educ. Law §2573(10-a).

17. Were it not for New York's examination and licensing procedure, plaintiffs Chance and Mercado would be appointed permanent elementary school principals. Both already have attained State certification for that position, and both were

selected for their present acting principalships by their respective community school boards, in accordance with New York City's decentralized system, after extensive selection processes. Moreover, both are specially trained to be principals, having graduated a year-long Fordham University Instructional Administrators and Principals Internship Program in Urban Education.

18. There is at present no outstanding list for the position of elementary school principal. The Board of Examiners has announced its intention to hold an examination procedure for the position of elementary school principal on November 3, 1970, and to promulgate a new list in the spring of 1971 based on such procedure. If plaintiffs Chance and Mercado do not pass such an examination procedure, they would have to be removed from their present positions--notwithstanding the merits of their performances--and replaced by persons on such a new list pursuant to N.Y. Educ. Law §2573(2); Board of Education By-Law 101(3).

19. Upon information and belief, in addition to the examination for the position of principal, elementary school, the Board of Examiners has scheduled approximately 14 other supervisory examinations for the year 1970-71. Upon information and belief said Board will in the coming months promulgate numerous eligibility lists and issue licenses for yet other supervisory positions based on past examinations.

20. There are approximately 1,000 persons who hold a city license of principal for some level of the New York public school system. Most - but not all - such persons actually head schools.

Others function in various administrative positions. Of the licensees only 11 are black (about 1% of the total) and only one is Puerto Rican. Upon information and belief, out of approximately 750 persons licensed as principal for New York City elementary school, five are black (less than 1% of the total) and none is Puerto Rican. The percentage of persons licensed for other supervisory positions who are black or Puerto Rican is also strikingly low compared to their percentage of the school student population. Thus, for example, upon information and belief, of the 180 administrative assistants for high schools none are black or Puerto Rican. Of the 1610 assistant principals, junior high and elementary schools, only 7.0% are black and .2% Puerto Rican. Further, at the time the list for the position of principal, elementary school, was originally promulgated, of 340 persons on the list only 6 or 1.8% were black and 0 were Puerto Rican. At the time the list for principal, high school was promulgated there were no blacks or Puerto Ricans among the 22 persons listed. At the time the list for principal, junior high school was promulgated, of the 115 persons on the list only 1(0.9%) was black and 1 (0.9%) Puerto Rican. At the time the list for assistant principal, junior high school was promulgated, of the 690 persons on the list only 55(8.0%) were black and none were Puerto Rican.

21. The Board of Examiners procedures are the major factor accounting for this low percentage in minority group personnel. The percentage of New York City school supervisory personnel who are black or Puerto Rican is strikingly lower than the comparable figures for the four next largest cities in the United States.

22. The Board of Examiners testing procedures are biased against blacks and Puerto Ricans. They frequently emphasize esoteric cultural facts unrelated to the supervisory positions

in question. Moreover, these tests place a premium on familiarity with organizational peculiarities of the New York City school system which, while having little to do with educational needs, are largely gained through coaching and assistance from present, predominantly white, supervisory personnel. Blacks and Puerto Ricans, not having had equal access with whites to such treatment, are at a severe disadvantage with respect to Board of Examiners tests.

23. The testing procedures do not indicate a candidate's ability to do the job being tested for. There is no evidence that they measure merit or fitness, they have never been validated, and they are unreliable psychological instruments. Moreover, they are not objective in their assessment of candidates but, on the contrary, are highly subjective. Upon information and belief, most or all such testing procedures contain written and/or oral portions. The questions are composed, and the candidates are evaluated and rated, by examination personnel who have had no training in professional test administration. Such examination personnel thus necessarily render their judgments -- both as to the pertinency of the questions and the appropriateness of the responses -- on the basis of their individual subjective predilections. There has never been any empirical study to determine whether these questions and the method of evaluating responses measure or predict a candidate's ability to do the job for which a test is given.

24. Moreover, because of the established discriminatory reputation which these Boards of Examiners procedures have in the black and Puerto Rican communities, a large portion of otherwise eligible minority group persons have been discouraged from seeking a license.

VIOLATIONS OF LAW

25. The administration by defendant Board of Examiners of unvalidated supervisors examinations, which has effected without any rational justification a racial classification because of the dearth of blacks and Puerto Ricans licensed therefrom, is a violation to the right of plaintiffs and their class to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs and their class have no adequate administrative remedy available to them to challenge and prevent defendants' conduct and use of examinations for supervisory positions in the New York City School system.

26. Article V §6 of the New York State Constitution states in pertinent part:

> Appointments and promotions in the civil service of the state and all of the civil subdivisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination . . . .

Moreover, §2590-j 3(e)(1) of the New York Education Law states in pertinent part:

> The board of examiners shall prepare and administer objective examinations to determine the merit and fitness of all candidates for . . . supervisory service positions . . . .

The testing procedures of defendant Board of Examiners, being neither objective nor being measurements of merit and fitness for the particular jobs involved, and yet being a basis for promotion in the civil service, are conducted in violation of Article V §6 of the New York State Constitution and §2590-j 3(a)(1) of the New York Education Law.

27. Section 2569 subd. 1 of the New York Education Law states in pertinent part:

> . . . The Board[of Examiners] shall periodically review the validity and reliability of examinations as well as examination procedures . . . .

Although this provision has been in effect since 1967, the Board of Examiners has never complied with it. This provision represents the determination by the Legislature that merit and fitness can only be demonstrated by examinations that have been proven valid. Thus every Board of Examiners testing procedure for supervisory positions which is presently planned or scheduled, such as that for elementary school principal, is in dereliction of said §2569(1).

28. Section 2573(10) of the New York Education Law states in pertinent part:

> . . . The board of education, on the recommendation of the superintendent of schools [Chancellor] shall designate, subject to the other provisions of this chapter, the kind of grades of licenses which shall be required for service as principal . . . principal, branch principal, director, assistant examiner in the board of examiners, supervisor or teacher of a special branch, head of department, assistant, . . . together with the academic and professional qualifications required for each kind and grade of license . . .

The Board of Examiners, on the other hand, has no statutory authority to establish academic or professional qualifications for any license. Nevertheless, upon information and belief, the Board of Education has in the past and plans to continue a practice of leaving to the exclusive discretion of the Board of Examiners the perparation, administration and grading of supervisory examinations, including the proposed forthcoming examination procedure for the position of elementary school principal, together with the determination of the appropriate academic and professional level of the content of said examination. The result of this total deference by the Board of Education to the Board of Examiners is that the latter body effectively establishes

the level and quality of academic and professional qualifications which are required to obtain the license of elementary school principal. The Board of Examiners is the sole determinant of the academic knowledge and professional abilities which a candidate must possess for successful completion of the testing procedure. The administration of any examination procedure for the position of principal in which the Board of Education does not specifically instruct the Board of Examiners as to the particular academic and professional qualities it is to test for, is an unlawful delegation of authority in violation of said §2573(10).

WHEREFORE, plaintiffs respectfully pray:

(a) that this Court declare that defendant Board of Examiners' present and planned use of supervisory examination procedures is in violation of the Fourteenth Amendment of the Constitution of the United States and under the doctrine of pendent jurisdiction, declare the same in violation of §§2569(1), 2590-j 3(a)(1) and 2573(10) of the New York Education Law, and of Article V §6 of the New York State Constitution;

(b) that defendants and their successors be preliminarily and permanently restrained and onjoined from administering or otherwise making use of any written and/or oral test, as a criterion for the granting or withholding of the New York City license of elementary school principal or of any ohter New York City public school system supervisory license, which

has not been prepared and validated in accordance with the latest standards of professional psychological testing as accurately measuring the merit and fitness of candidates to perform the tasks of the position for which the testing is being administered;

(c) that defendants and their successors be further preliminarily and permanently enjoined from administering or making use of any examination for principal, or other supervisory positions covered by N.Y. Educ. Law § 2573(10), which has not been prepared in accordance with, which does not strictly adhere to, and which in any way exceeds specific academic and professional standards for the license established by the Board of Education pursuant to said §2573(10);

(d) that this Court retain jurisdiction in the action until such time as defendants comply with the constitutions and statutes cited herein;

(e) that this Court award plaintiffs their costs and attorneys' fees; and

(f) that this Court grant such other and further relief as may be proper.

Respectfully submitted,

/s/

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Attorneys for Plaintiffs

Affidavit in Support of Motion of Richard S. Barrett
verified and submitted on May 28, 1971

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- -

BOSTON H. CHANCE and LOUIS C. MERCADO, et al. individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

Index No. 70 Civ. 4141

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AFFIDAVIT OF RICHARD S. BARRETT RELATING TO RESEARCH STUDIES CONDUCTED BY THE BOARD OF EXAMINERS

RICHARD S. BARRETT, being duly sworn, deposes and says:

1. My name is Richard S. Barrett and I submit this affidavit in further support of Plaintiffs' Motion for Preliminary Injunction.

2. I have submitted two previous affidavits in the instant case, filed on October 20, 1970 and on November 6, 1970. These affidavits were based on: (1) analysis of a number of supervisory examinations conducted by the Board of Examiners and examination of certain papers filed by plaintiffs (complaint, motion for preliminary injunction and supporting memorandum); and (2) examination of the affidavit of Murray Rockawitz filed October 27, 1970 together with its attached Exhibits, which Exhibits included the affidavits of four persons [1] who had

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1/ Robert L. Thorndike, Marvin Sontag, Aaron Carton and Irwin Carton.

certain opinions regarding the supervisory examinations and examination procedures of the Board of Examiners.

3. On the basis of the materials I examined for purposes of my two previous affidavits one cannot conclude that the supervisory examinations conducted by the Board of Examiners possess either content or predictive validity--that is, that the content of the examinations is truly a sample of the work performed on the job or that the examinations actually select the better performers. In addition to the comments contained in my previous affidavits, I note the following:

4. Dr. Rockawitz' claim for the validity of supervisory examinations was based primarily on a number of alleged research and validity studies which were not submitted with his affidavit. Thus in his chief affidavit paras. 16 and 17 he states that the Board of Examiners has conducted numerous research studies which were designed to determine and which confirmed the validity of the Board's examinations. Further, in his second affidavit, attached as Exhibit 5 to his chief affidavit, he claims that there have been at least three empirical validity studies of examinations (para. 8) and that their results "indicate substantial positive correlations between the purposes of the examinations involved and the results obtained by the procedures of the Board of Examiners" (para. 9). Specifically, he relies on the results of a validity study of elementary school principals examinations as showing that principals identified by their supervisors as having best implemented an educational program scored higher on the examinations than a randomly selected group of principals (para. 10). And finally he alleges that the Board of Examiners' satisfaction of its statutory duty to review

reliability and validity is shown by 22 separate studies and by three volumes relating to research performed by the Board of Examiners (paras. 12 and 13).

5. Dr. Rockawitz' claim for validity was also based on the opinions of the four experts whose affidavits were submitted as Exhibits 2a, 2b, 2c and 2d to his chief affidavit.[2/]

6. Examination of these experts' affidavits reveals that none of them claims to have conducted a study which would make possible a conclusion that the Board of Examiners' examinations and examination procedures possessed either content or predictive validity. And, indeed, these experts draw no such conclusion. Rather, the most that they claim is that on the basis of statements made to them by Board of Examiners' representatives and of documents submitted to them,[2a/] it appears that the Board of Examiners attempts to design content-valid tests. They make no claim that the Board of Examiners had established the predictive validity of its examinations.[3/] Nor do they claim that the examinations possess content validity. Indeed, it is clear from their affidavits that these experts did not conduct the kind of analyses which could support a claim of content validity. Thus they did not, for example, conduct a thorough analysis of the various different supervisory jobs at issue, establish definitions of good and poor performance, and determine whether the tests at issue adequately represented the

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2/ See para. 10 to Dr. Rockawitz' second affidavit, filed as Exhibit 5 to chief affidavit; see para. 14 of his chief affidavit.

2a/ And apparently, in 2 cases, of some prior experience with the Board.

3/ They refer only to the one pilot predictive validity study, filed herewith as Exhibit 1, and discussed infra at para. 9; and they do not claim that it supports the predictive validity of the Board's supervisory examinations.

most important aspects of the related jobs.[4] Instead they apparently based their opinions primarily on statements made to them by the Board of Examiners' representatives describing examinations and examination procedures and on the research studies cited by Dr. Rockawitz together with other documents submitted to them by the Board of Examiners. Their conclusions were necessarily limited by the nature of their investigation. Since they did not perform a content analysis they did not and could not claim content validity on the basis of their own investigation. They could and did claim only that on the basis of what they had been told and shown the Board of Examiners appeared to have made certain efforts to design content-valid examinations.

7. I have now examined all the research studies and reports referred to and relied on by Dr. Rockawitz and the Board of Examiners' experts in their respective affidavits (hereinafter referred to as "research reports"). I have also examined the list of documents which were submitted to the four experts whose affidavits were filed on behalf of the Board of Examiners, in addition to examining the documents named therein. These reports and documents were provided me by counsel for plaintiffs, identified as all the documents produced in response to Plaintiffs' Request for Production of Documents, filed March 24, 1971. They are filed herewith as Exhibits 1-10 to this affidavit.[5]

8. I concluded from my examination of each of the research reports referred to in para. 7 above that:

4/ For a description of the kind of analysis necessary to support a claim of content validity see generally my second affidavit pp. 6-8. See also Standards for Educational and Psychological Tests and Manuals (American Psychological Assoc. 1966) pp. 12-13, 15-16.

5/ Reference is made with respect to each exhibit to the relevant paragraph of Plaintiffs' Request for Production.

The only documents produced by Defendant Board of Examiners

(a) No study supported a claim of predictive validity.

(b) No study constituted a content analysis or related to a claim of content validity.

9. The only study relating to validity is that entitled Analysis of Examination for Principal of Elementary Schools which appears as Exhibit 1 (produced in response to Request 1(c)). It is subject to numerous methodological flaws. But even assuming the study had been properly designed it would not support a claim that the examinations in question were related to job performance It indicates, rather, that no such relationship exists.

In this seven-page self-styled "pilot study" (p. 1), 57 principals were nominated by their supervisors for the experimental group as having "best implemented an educational program in their schools" (p. 2). No analysis of the position is reported but it seems that implementing an educational program is an important part, but only a part, of the principal's duties. No information is given as to the basis on which selections were made or the reliability of the selections. 6/

5/ Continued

that have not been filed as Exhibits are the following:

(1) Item analyses produced in response to Request 1(g). These are computer run-offs, unintelligible without further analysis and explanation and enormously bulky. They are irrelevant to the issue of validity, as is revealed in the Appendix hereto, p. 3a , infra.

(2) The written part of the examination for Assistant Principal, Junior High School 1968, produced in response to Request 7. This was previously filed by Plaintiffs as Exhibit 1 to Affidavit of Elizabeth B. DuBois filed November 6, 1970.

(3) The written part of the examination for Principal, Day Elementary School 1964 and related duties, produced in response to Request 7. This was previously filed by Defendant Board of Examiners as Exhibit 4b to Dr. Rockawitz' affidavit filed October 27, 1970.

6/ Only those supervisors who wished to participate did; whatever number of names (from 2 to 5) they sent in were accepted for the experimental group.

Comparisons were made between the scores of these 57 principals and a control group of 111 randomly selected principals on six different tests taken from January 11, 1946 to March 17, 1966. There is no discussion of the tests, so it is impossible to know from the report whether the nature of the tests was constant over the 20 year period or whether they are like the test for this position administered in 1970-71.

No conclusions can be drawn from Table 3, which presents "the mean rank order of examination scores . . .," since averaging ranks is a prohibited arithmetic operation.

Table 4 compares the means of the raw scores on the different tests. In four cases the experimental group had higher average scores than the control; in two it had lower scores. Two of the cases where the experimental group had higher scores were found to be statistically significant, but the report itself notes that:

> "Although statistically significant differences were reached for these two years, the relatively small population of the samples involved should be noted." (p. 6) 7/

Where the numbers of candidates for each test were larger, the differences between experimental and control groups were small, ranging from 1.84 to -.48 points on examinations in which the average scores were in the low seventies. Therefore, analysis of the results of the different tests cannot support any conclusion that the experimental group performed better on these tests as a whole than the control group.

The study attempted to analyze the aggregate test data by converting the scores on each examination to standard scores and

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7/ These two examinations involved only 7 out of the 57 members of the experimental group; and only 16 out of 111 members of the control group, or less than 14% of the total candidates.

comparing these for all examinations combined. The results are contained in Table 5. While again these results are flawed by improper methodology, the report itself concedes: "The difference between the means did not, however, reach significant levels" (p. 6). Indeed, the difference is so small (50.93 for the experimental group; 48.57 for the control group) as to indicate that even if these scores represent the true difference between the two groups the examinations failed to distinguish in a useful way between those who would be good performers (as defined by the study) and those who would not.

In the conclusion, despite the statement quoted above, the report states:

> The data indicate that elementary school principals who were identified as having best implemented an educational program in their schools score higher on the Board of Examiners license examinations than do a randomly selected group of elementary principals (p. 7).

The data do not support this conclusion. Instead the data presented indicate that there is no significant difference in the scores of the two groups.

10. The remaining research studies submitted by the Board of Examiners deal with the internal structure of the tests and are not concerned with validity. At best they indicate that the Board has made a limited study of the reliability of some of its procedures. Other reports cited by Dr. Rockowitz as research studies consist simply of a research proposal to develop a job analysis for the position of Elementary School Principal, descriptions of teacher selection procedures in various school systems in the United States, and a report on a conference held by the Board of Examiners on teacher selection procedures. Brief descriptions of each of these documents are contained in the

Appendix hereto, infra pp. 1a-6a . The documents themselves are filed herewith as Exhibits 2 - 8.

11. I also examined the documents submitted to the four experts whose affidavits were filed by the Board of Examiners in order to evaluate the Board's claim for content validity of the supervisory examinations.

12. The list of all documents submitted to said experts, as a basis for their affidavits, appears as Exhibit 9. Some of the research reports discussed in paras. 8-10 above and analyzed in the Appendix hereto are included on this list. They appear as separate Exhibits. The remainder are contained in Exhibit 10, identified by the item numbers by which each is designated on the Exhibit 9 list.[8]

13. Some of the documents listed in Exhibit 9 indicate that the Board of Examiners has taken precautions to assure that both the objectively and subjectively scored portions of the written examination are graded with the identity of the test taker adequately concealed. There is no indication that a special effort has been made to eliminate or minimize the effects of ethnic prejudice in the interview test, or other procedures in which the identity of the candidate is known.

14. None of the documents listed in Exhibit 9 can support a claim for content validity, in the absence of the sort of thorough investigation described in para. 6 above and pp. 6-8 of my second affidavit. Included in Exhibit 10 are statements of the "Duties of the Position" and the written tests for a few of the supervisory positions in the New York City school system. But no conclusion as to validity can be drawn from simply looking at these documents. A detailed study of the job duties and a

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[8] Items No. 14 and 19 are omitted from Exhibit 11 since, as noted supra n. 5, they were filed previously.

logical comparison of these duties with the test is required. The inadequacies of the documents entitled "Duties of the Position" have been discussed in para. 2 of my second affidavit. These are administratively oriented descriptions, not the kind of detailed analysis of the position in terms relevant to the selection procedure that is essential to any attempt to establish validity. The research proposal filed herewith as Exhibit 7 makes clear the need to develop a job analysis for the position of Elementary School Principal and that no such analysis has ever previously been performed.

15. As noted in my previous affidavits, it is both reasonable and desirable to demand that examinations for positions of the level of supervisor in a major school system be shown to be related to job performance even though it is more difficult to establish success criteria for such a position than for positions involving primarily mechanical skills such as that of a typist or factory worker. The experience of many organizations shows that validated tests improve the quality of the work force in higher level positions such as business executive, life insurance agent, or psychiatrist. The Board of Examiners has clearly had an opportunity to develop modern, valid selection procedures. The tests and the research studies that I have examined are clearly inadequate to the task of selecting the better candidates for supervisory positions in the New York City school system.

That validation of tests of this nature is feasible is illustrated by the fact that many organizations have developed valid predictors regarding success on a wide variety of executive positions. And the Board of Examiners has itself recognized the need for and feasibility of developing proper job analyses and success criteria and for validating their procedures. This is illustrated by the report of the conference on teacher selection methods, which appears as Exhibit 8c and is summarized in the Appendix hereto, p. 5a. At that conference, experts

selected by the Board of Examiners, as well as Board representatives, testified to the need for and feasibility of developing success criteria and validation techniques in the area of teacher selection and such recommendations were adopted in the rep 's conclusion. In addition, the Board's own research proposal for the development of a job analysis for the position of Elementary School Principal (para. 14 above, Exhibit 7; Appendix p. 3a) indicates its belief that success criteria can be defined in this area. And finally, the Board's pilot predictive validity study (Exhibit 1; para. 9 above) shows that it believes it is feasible to design studies to determine whether its tests are successful in selecting the better performers.

Richard S. Barrett
RICHARD S. BARRETT

Subscribed and sworn to before
me this 28th day of May, 1971.

Ann Wagner
Notary Public

ANN WAGNER
Notary Public, State of New York
No. 31-0412003
Qualified in New York County
Commission Expires March 30, 1972

Affidavit in Opposition to Motion of
Murray Rockowitz verified and
submitted on June 4, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE AND LOUIS C. MERCADO, et al., Plaintiffs, -against- THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., Defendants.	REPLY AFFIDAVIT 70 Civ. 4141

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

Dr. Murray Rockowitz, being duly sworn, deposes and says:

1. I am a member of the Board of Examiners and have primary responsibility for research and development.

2. I submitted a prior affidavit verified on October 26, 1970 in opposition to plaintiffs' motion for a preliminary injunction. The present affidavit is submitted in reply to the third affidavit of Richard S. Barrett verified on May 28, 1971.

3. It is the position of the Board of Examiners that the pass-fail statistics on the 50 examinations surveyed as illuminated by expert analysis do not show sufficiently substantial differences between the performance of ethnic groupings to raise an inference that the examination system may have a discriminatory impact upon blacks or Puerto Ricans. Accordingly, defendant believes that the plaintiffs have not shown and could not show any possible

invasion of their Constitutional rights and the Complaint should be dismissed.

4. It is also the contention of the Board of Examiners that under applicable Constitutional law, plaintiffs must not only properly allege and show a discriminatory impact but must properly allege and prove that the supervisory examinations do not bear a rational relationship to the legislative purpose of providing a pool of qualified personnel from which local school boards may select individuals suitable to the particular needs of their respective communities. On the other hand, plaintiffs claim that this burden rests on the defendants not the plaintiffs. Regardless of whoever has the burden of proof, it is abundantly clear that the overwhelming evidence before the Court regarding the matter of job-relatedness demonstrates that the supervisory examinations are in fact job-related. I refer to the affidavit of Gertrude Unser verified on October 26, 1970 and to my previous affidavit of the same date, which affidavits outline the fundamental testing procedures employed by the Board of Examiners, and I refer also to the affidavits of Dr. Robert L. Thorndike, Dr. Marvin Sontag, Dr. Aaron Suss Carton and Dr. Esin Kaya Carton (all attached as exhibits to my previous affidavit), all of whom are experts in the field of educational testing and have reviewed the Board's examination procedures for purposes of this litigation.

5. Dr. Barrett's latest affidavit is the first testimonial proof offered by plaintiffs which seriously purports to bear on the question of the job-relatedness of defendant's examinations. However, Dr. Barrett does not

even now meet the issue head on. Instead he resorts to attacking various research studies conducted by the Board's staff in recent years and has the temerity to discount the opinions of the four educational testing experts who carefully reviewed the testing procedures of the Board of Examiners and offered their judgments in the aforementioned affidavits, this from an individual whose experience appears to be primarily in the field of industrial psychology.

6. Dr. Barrett's affidavit is replete with simplistic conclusory statements based on assumptions which he does not prove, criteria which he does not document, and judgments which are not borne out by facts. An exhaustive rebuttal would serve no useful purpose in relation to the issues before the Court since Dr. Barrett does not deal directly with those issues. Accordingly, I shall limit my reply to examples of the foregoing points concerning Dr. Barrett's analysis.

7. In paragraph 4 of Dr. Barrett's affidavit, he states: "Dr. Rockawitz' (sic) claim for the validity of supervisory examinations was based primarily on a number of alleged research and validity studies. . . ." This is sheer nonsense. Our claim for the validity and job-relatedness of these examinations rests largely on the thoroughly professional test construction techniques employed by the Board of Examiners which have been explained fully in earlier affidavits. We also asked the above-mentioned noted educational testing experts to review and evaluate our examination procedures and give their opinions of the objectivity, reliability and validity of those procedures. Their judgments were uniformly favorable. Finally, we rely on

continuing research done by the Board's staff. However, that research is not done to meet Dr. Barrett's abstract and unrealistic standards, nor is it done in contemplation of litigation; it is performed by professionals to make practical recommendations on ways to improve testing techniques.

8. In paragraph 6 of his affidavit, Dr. Barrett cavalierly charges that none of the four distinguished experts who furnished affidavits "conducted a study which would make possible a conclusion that the Board of Examiners' examinations and examination procedures possessed either content or predictive validity". Dr. Barrett evidently assumes that no expert can form a judgment concerning the validity of examinations unless he replicates the entire test construction procedure personally. It ill behooves Dr. Barrett to make this statement considering the opinions which he offered in his first affidavit on the basis of meager analysis and much speculation. But beyond this, his thesis that one cannot form a judgment concerning validity unless one actually conducts the test is plainly contradicted both by common sense and by the literature in the field. As Dr. Lee J. Cronbach (one of the leading experts who along with Dr. Robert Thorndike plaintiffs cited for authority in their first brief) points out: "Content validity is established by logical examination of the test and the method used in its preparation." Lee J. Cronbach, Essentials of Psychological Testing, Harper & Bros., 1960, p. 364. "If a test is prepared according to a clearly described sampling plan, the user can judge content validity very simply. He needs only to decide whether he is satisfied with the test

maker's choice of universe content and his sampling methods". Id. at 365.

9. Dr. Barrett next observes that the four experts "apparently based their opinions primarily on statements made to them by the Board of Examiners' representatives describing examinations and examination procedures and on the research studies cited by Dr. Rockawitz (sic) together with other documents submitted to them by the Board of Examiners" (Barrett 3rd Affidavit, p.4). Again, Dr. Barrett makes erroneous assumptions to fit his predetermined conclusions. Indeed, in the very next paragraph of his affidavit, Dr. Barrett refutes his prior assumption. The experts relied primarily on examination of a host of documents, many included at their own request, illuminating the test construction and grading techniques employed by the Board of Examiners. Oral explanation was also provided when requested. These distinguished experts knew precisely what documentation and other information would be necessary to make an informed judgment under the circums nces.

10. Dr. Barrett says that "no conclusion as to validity can be drawn from simply looking at these documents [the documents reviewed by the four educational testing experts]" (Barrett 3rd Affidavit, p.8). Of course not. It takes more than "simply looking"--it takes thought and evaluation. As Dr. Robert L. Thorndike observed in his affidavit:

> "The closeness of match between the tasks as set forth in the examination and the duties of the job as set forth by the supervisory personnel in the city system can be evaluated only by informed judgment, not by statistics or manipulation of numbers. It is a judgment arrived at by examining the statement of

> requirements and by looking carefully at the questions together with the procedures set up for evaluating answers to those questions. In general, the Board of Examiners appears to have made a conscientious and informed attempt to develop test tasks that do correspond to selected ones of the specifications set forth by the supervisory persons who set out the requirements for the job."

The "specifications" referred to by Dr. Thorndike are the "Duties of the Position" prepared by experts designated by the Chancellor. Notwithstanding Dr. Barrett's protestations to the contrary, none of the educational testing experts found these specifications insufficiently detailed. Moreover, as I have previously stated in my earlier affidavit, the procedure which Dr. Barrett requires--namely, "a detailed study of the job duties and a logical comparison of these duties with the test" (Barrett 3rd Affidavit, pp. 8-9)--is one which has been uniformly followed by the Board of Examiners in test construction.

11. Concerning the actual opinions offered by the four experts, Dr. Barrett states that none of the experts "claim that the examinations possess content validity" (Barrett 3rd Affidavit, p.3). The experts have testified that the examinations are content valid in the accepted sense of the term. As Dr. Lee J. Cronbach said in the authoritative 1971 publication of the American Council on Education entitled Educational Measurement:

> "Content validity is impermanent. The items or tasks in the test reflect social events, job descriptions, accepted beliefs about the world, decisions about what the curriculum should cover, etc." (p. 457)

Dr. Barrett speaks of content validity as if it were some fixed and immutable standard about which categorical statements are quite appropriate. Again, both common sense and

the literature reject this notion: "It is nonsense to talk about validity in the abstract. The validity of a test is always with reference to some particular variable and not variables in general." Allen L. Edwards, Statistical Methods for the Behavioral Sciences, Holt, Rinehart & Winston, 1962, p. 179. Judgments concerning content validity being matters of degree, the stated opinions of these four distinguished experts firmly support the rational and professional character of the examination procedures employed by the Board of Examiners. In this context, it might be useful to contrast the categorical statements of Dr. Barrett with the responsible evaluations of these four experts.

Dr. Robert L. Thorndike stated:

> "In general, the Board of Examiners appears to have made a conscientious and informed attempt to develop test tasks that do correspond to selected ones of the specifications set forth by the supervisory persons who set out the requirements for the job.
>
> Obviously, it is possible in any limited period of time to test only some of the requirements even if all of them could be reduced to a paper-and-pencil test or to an interview situation. Necessarily, any test represents a sampling of job duties and represents a sampling from among those that can be reduced to a paper-and-pencil or interview testing situation. Within these limits, the tasks that are represented in the test items appear to me to be reasonable tasks as representing selected ones of the job requirements."

Dr. Marvin Sontag stated:

> "In determining the skills to be measured and in preparing the test items, the Board of Examiners routinely consults panels composed of both persons holding the particular jobs and university professors with expertise in the pertinent areas. Thus, a conscientious attempt is made to combine both practical and theoretical viewpoints. This thinking is kept current by employing a new panel each time an examination is offered. While no one can argue

> that the products are always perfect, this approach is all that can be hoped for in such a situation. It represents an honest attempt to achieve relevance and validity, and it allows the examination to reflect changes in thinking regarding the nature of a particular job."

Dr. Aaron Carton stated:

> "The approach used by the Board of Examiners in determining the validity or relevance of its tests consists essentially of a strategy which relies on the judgments of experts and consensus among them as to what constitutes an appropriate test item."

Finally, Dr. Esin Carton stated:

> "The procedures used to establish the validity of the tests indicate that the items selected for the examination represent an attempt to simulate the events candidates would encounter on the job. There are different techniques for either assuring or studying the relevance of the test to the requirements of the job. The technique used by the Board, namely establishing content-validity, attempts to assure the relevance of the items on the test to job criteria established by the professionals in the field."

12. In paragraph 9 of his affidavit, Dr. Barrett seeks to attack a Board of Examiners' research study--acknowledged to be a pilot study--concerned with predictive validity. His analysis is an exercise in nit-picking. For example, he challenges the criterion employed, making the incredible statement that "implementing an educational program is an important part, but only a part, of the principal's duties". One wonders what criterion Dr. Barrett would use in a pilot study involving the position of elementary school principal. The Board of Examiners went to the person most closely aware of the quality of the work being performed by the principal--his immediate supervisor, the District (Community) Superintendent. To whom would Dr. Barrett ask us to go instead?

13. Any researcher worth his salt would admit that few studies can claim to be all-inclusive and completely free of procedural flaws. Dr. Barrett faults us for acknowledging these. For example, we cannot be expected to involve in a study people who fail the examination because they did not have the opportunity to serve as principals. Would he counsel sending 1,000 unlicensed pilots into the air, allow 300 of them to crash, and then conduct a differential study of the examination they took so that we can determine whether the test had predictive validity? No, the Board of Examiners does not claim that the study is conclusive. Indeed, the discussion of the exploratory study as reported contains this guarded but honest evaluation. "This pilot study deals with a highly select group of successful candidates and a less-than-perfect criterion measure. In spite of these limitations, the empirical evidence is supportive of the selection procedures utilized."

14. Dr. Barrett is also guilty of overreaching and plain error in many of the "nits" he "picks". For example, he states that "only those supervisors who wished to participate did" (Barrett 3rd Affidavit, p.5, n.6). The report indicates that 28 of 30 superintendents participated. He further questions whether "the nature of the tests was constant over the 20-year period" (Barrett 3rd Affidavit, p.6). The obvious answer is--of course not. One would not expect the examination to remain the same since the role of the principal has changed over the 20 years and will continue to change in the future. This is a basic problem with predictive validity studies of educational supervisory positions. Barrett goes on to state that "averaging ranks

is a prohibited arithmetic operation" Ibid. This assertion is contradicted by the literature in the field. See Edwards, Statistical Methods for the Behavioral Sciences, Holt, Rinehart and Winston, 1962, p. 412. Barrett also finds fault with the analysis of "aggregate test data by converting the scores on each examination to standard scores and comparing these for all examinations combined." Ibid. Again he is contradicted by the literature. See Edwards, op. cit. supra, pp. 104-06.*

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* Dr. Barrett continues his exercise in nit-picking in the Appendix to his affidavit which is entitled "Analysis of Research Reports". His analysis largely consists of searching for flaws in research reports prepared by the Board's staff. Again he is frequently in error. For example, in the first report "analyzed" (marked "Exhibit 2") Dr. Barrett notes that 11 of the 27 assistant examiners questioned had no previous experience, observing that "their opinions on four of the questions are tabulated along with those of experienced examiners" (Barrett 3rd Affidavit, p. 1a). If Dr. Barrett had taken the time to read the text of the report, he would have found a breakdown of the opinions of experienced and inexperienced assistant examiners on all of the questions. Noteworthy, too, is Dr. Barrett's failure to submit the 13 item analyses performed by the Board's staff. He comments that these are "unintelligible without further analysis and explanation and enormously bulky" (Barrett Affidavit, p.5, n.5). These should not be "unintelligible" to an educational testing expert. Moreover, his further observation that these item analyses are irrelevant to the issue of validity is contradicted by the literature. Dr. Thorndike points out that, "the effectiveness of a test depends on the characteristics of the items which compose it. In both its reliability and its validity a test score is the resultant of the validities, reliabilities, and intercorrelations of its component items". Thorndike, Personnel Selection: Test and Measurement Techniques, John Wiley & Sons, 1949, p. 227. He goes on to say that, "as soon as the validity is determined for each item, we are in effect treating each item as a separate test. It is as if we had the validity coefficients for a very large number of very brief tests". Id. at 244.

15. Shifting from the matter of validity to the matter of objectivity, Dr. Barrett reluctantly acknowledges that there is evidence that "the Board of Examiners has taken precautions to assure that both the objectively and subjectively scored portions of the written examination are graded with the identity of the test taker adequately concealed" (Barrett 3rd Affidavit, p.8). He goes on to state, however, that "there is no indication that a special effort has been made to eliminate or minimize the effects of ethnic prejudice in the interview test, or other procedures in which the identity of the candidate is known" (emphasis added). Ibid. Quite so. It has been the policy of the Board of Examiners throughout its history to make no "special effort" on behalf of any group. Both sound testing procedures and the Board's legislative mandate command this approach. The Board's examination procedures which have been previously outlined in our papers are designed to minimize subjectivity in all interview tests regardless of the external characteristics of any applicant, among them race, religion, national origin, age or sex. Is Dr. Barrett suggesting that sound testing procedures should provide special treatment for special groups?

16. Permeating Dr. Barrett's entire affidavit is his contention that predictive validity studies are both feasible and necessary to support the Board's examination procedures. Dr. Barrett is notably behind the times in his knowledge of the field of educational testing. Again, we can quote from the comments of Dr. Lee J. Cronbach in the latest authoritative text in the field:

> "The theory of prediction was very nearly the whole of validity theory until about 1950; in the last two decades testers have given increasing attention to descriptive and explanatory interpretations and have relegated prediction theory to a secondary position." Educational Measurement, op. cit. supra, p. 443.

17. Concerning the feasibility of predictive validity, Dr. Barrett makes the following statement: "The experience of many organizations shows that validated tests improve the quality of the work force in higher level positions such as business executive, life insurance agent or psychiatrist" (Barrett 3rd Affidavit, p.9). There is a notable absence of supportive citation. By contrast, Educational Testing Service, the largest educational testing institution in the country, has said of its National Teacher Examinations:

> "Because no claim is made that NTE scores predict 'teaching effectiveness,' there has been no attempt to present data relating NTE scores to this global criterion." Educational Testing Service, NTE Prospectus For School and College Officials, 1970, p.18.

18. Finally, with a "have your cake and eat it too" attitude, Dr. Barrett reaches into the Board's own research reports and proposals to support his claim as to the feasibility of predictive validity studies of examinations for supervisory positions. Dr. Barrett cites comments of experts reported in Teacher Selection Methods published by the Board of Examiners in 1967. What was said? Of his proposal for predictive validity studies for teacher selection procedures, Dr. Harold E. Mitzel, Dean for Research at Pennsylvania State University, observed that "the proposal is deceptively simple, fantastically expensive, and politically difficult to bring about". Id. at 102. Lastly,

Dr. Barrett points to the Board's own Federal research proposal and its pilot predictive validity study to support his assertion that the Board itself "believes it is feasible to design studies to determine whether its tests are successful in selecting the better performers" (Barrett 3rd Affidavit, p.10). For a supposed research expert to make a statement of this kind is incomprehensible. For the Board of Examiners to fail to pursue an important avenue of research is an inquiry. It may be undertaken on the basis of a belief, a neutral preconception or even a doubt. It is a search for knowledge.

19. In any event, Dr. Barrett's entire effort to manipulate the Board's research reports is a straw man device. The Board's research is part of an on-going effort to improve the objectivity, reliability and validity of its examinations. Insofar as the present litigation is concerned, the job-relatedness of defendant's supervisory examinations has been established beyond peradventure of doubt.

Murray Rockowitz

Sworn to before me this
4th day of June, 1971.

Notary Public

PERRY M. BRAUNSTEIN
Notary Public, State of New York
No. 41-5429525
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1972

Opinion (Mansfield, *C. J.*) filed on July 14, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York,

Defendants.

70 Civ. 4141

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MANSFIELD, C.J.*

The fairness and validity of competitive examinations, once described by Gilbert and Sullivan as the means of attaining "a Duke's exalted station,"[1] have frequently been challenged in courts and elsewhere. E.g., Griggs v. Duke Power Company, ___ U.S. ___, 91 S. Ct. 849 (1971); Louisiana v. United States, 380 U.S. 145 (1965); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 238-39 (1957); Armstead v. Starkville School District, 3 BNA Lab. Rel. Reptr., FEP Cases 419 (N.D. Miss. April 7, 1971). We are here called upon to decide whether those examinations which have been prescribed and administered by the Board of Examiners of the City of New York (the "Board" herein) to candidates seeking licenses for permanent appointment to supervisory positions in the City's school system (principals, assistant principals, administrative assistants, etc.) are unconstitutional. We conclude that a sufficient showing has been made of violation of the Equal Protection Clause of the Fourteenth Amendment to warrant the issuance of preliminary injunctive relief.

The two named plaintiffs, who are respectively Black and Puerto Rican, have brought this purported class action on

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* Heard the case as a District Judge and, after appointment to the Circuit Court of Appeals, was designated to sit on the District Court for the purpose of completing this phase of the case.

behalf of themselves and all other persons similarly situated pursuant to federal civil rights laws, 42 U.S.C. §§1981[2] and 1983.[3] They allege that the competitive examinations, which must be passed by a candidate before he or she can qualify for licensing and appointment, discriminate against persons of Black and Puerto Rican race, and have not been validated or shown fairly to measure the skill, ability and fitness of applicants to perform the duties of the positions for which the examinations are given, with the result that success on the examination does not indicate in any way that the candidate will succeed as a supervisor. This racial discriminatory effect, coupled with lack of justification or predictive value as measurements of abilities required to perform the jobs involved, is alleged to violate not only plaintiffs' federal constitutional rights but also (based on pendent jurisdiction) Art. 5, §6 of the New York State Constitution,[4] and §§2590-j(3)(1),[5] 2569(1),[6] and 2573(10)[7] of the New York Education Law.

Plaintiffs seek a preliminary injunction under Rule 65, F.R.C.P., prohibiting the alleged violations of these laws. They also seek declaratory relief[8] pursuant to 28 U.S.C. §2201. We have jurisdiction under 28 U.S.C. §§1331 and 1343(3).

The Board of Education has not actively opposed the motion for preliminary injunction, and it agrees that plaintiffs

have presented triable issues of fact. The Board of Examiners ("Board" herein), however, has vigorously opposed the motion.

In reaching our decision we have had the benefit of a plethora of lengthy affidavits and exhibits, a hearing at which oral testimony was taken, a series of arguments, and extensive briefing of the law and facts by the parties. In addition the following organizations have appeared as amici and filed briefs supporting plaintiffs: New Association of Black School Supervisors and Administrators,[9] ASPIRA of America, Inc.,[10] and the Public Education Association.[11]

An applicant for permanent appointment to a supervisory position in the New York City School System must, in addition to meeting state requirements for the position, obtain a New York City license.[12] First, each such candidate must have met minimum education and experience requirements established by the City's Board of Education and the Chancellor, Harvey B. Scribner, who is the Chief Administrator of the School District of the City of New York. For instance, a candidate for principal of a day elementary school must, among other things, have had (1) four years' experience teaching in day schools under regular license and appointment as a teacher, and (2) two years' experience of supervision in day schools under license and appointment, or meet various alternative experience requirements.

Next the candidate must pass an examination procedure prepared and administered by the Board for the particular type or classification of supervisory post desired, which may take as long as two years to complete. If the candidate successfully completes the testing procedure, he or she is granted a license and placed on a list of those eligible for assignment to the type of supervisory position involved. The appropriate school governing authority -- either a central board of education or a community school board under New York City's present decentralized system -- then selects the person it wishes from the eligible list to fill an open position. Since appointments of permanent supervisory personnel in the New York City School System must be made from lists of eligibles who have passed examinations, the Board from time to time announces and conducts examinations for particular supervisory posts (of which there are more than 50 different types) following which the number of persons eligible for appointment are supplemented by promulgation of lists of those who passed the latest examination. If a successful candidate, after being listed as eligible for appointment, is not appointed within four years, he or she is dropped from the list and must again pass the qualifying examinations to be listed as eligible.

Only in the cities of Buffalo and New York does state law provide for examinations in addition to state certification,

N.Y. Educ. Law §2573(10-a), and only the New York City School District maintains a Board of Examiners and the specific examination and licensing procedure here under attack. The Board has described itself as "a highly select group with broad professional background in education and related fields chosen through the most objective and impartially searching examination given under civil service." (Ex. 10, Item 10, attached to 5/28/71 aff. of Richard S. Barrett)

Were it not for New York City's special examination and licensing procedure, plaintiffs Chance and Mercado would have been appointed permanent elementary school principals. Both have been certified by the state for that position, and both are specially trained to be principals, having graduated from a year-long Fordham University Instructional Administrators and Principals Internship Program in Urban Education.

Plaintiff Boston M. Chance has been employed in the New York City public school system for the last 15 years and is acting principal of P.S. 104, an elementary school in the Bronx. Chance, who is of the Black race, possesses all of the basic qualifications of education and experience established by law and by the Board of Education and the Chancellor of the New York City School District for the position of principal of an elementary school. However, he lacks a city license as

elementary school principal and therefore is barred at present from securing a permanent position as principal. In September, 1968, Chance took the examination given by the Board for the position of Assistant Principal, Junior High School, but he failed it and thus was not placed on the eligibility list and was not issued a license entitling him to permanent appointment.

Plaintiff Louis Mercado, a Puerto Rican who also holds a New York State license as a principal, has been serving the New York City school system for the last 12 years. He is presently acting principal of P.S. 75, an elementary school in Manhattan, but he is barred from permanent appointment because he does not have a New York City liconse as an elementary school principal. Mercado is in a somewhat different position from Chance in that he does not allege that he has ever taken the relevant Board of Examiners' Supervisory Examination. While the present motion was pending -- and while the parties were collecting statistical information pursuant to our order -- the Board conducted their November, 1970 series of examinations for elementary school principal. Mercado withdrew from this examination and refused to take it on the grounds that the "Board of Examiners is not the appropriate agency for qualifying school personnel" and "the examination is not relevant ...."[13]

Both Chance and Mercado were selected for their present acting principalships by their respective community

school boards, in accordance with New York City's decentralized system. See generally, Council of Supervisory Associations v. Board of Education, 23 N.Y.S.2d 458, 197 N.Y.S.2d 547 (1969). In some instances such local school boards found, after interviewing licensed principals listed as eligible by the Board, that persons not so licensed were more qualified to serve as principals than those interviewed and that they performed their duties in a superior manner. (See Aff. of Peter J. Straus, 9/22/70).

There are approximately 1,000 licensed Principals of New York public schools of varying levels (e.g., elementary day, junior high school, high school, etc.), of whom some act as the heads of schools and others function in administrative positions. Of the 1,000 only 11 (or approximately 1%) are Black and only 1 is Puerto Rican. Furthermore, of the 750 licensed Principals of New York elementary schools only 5 (or less than 1%) are Black, and none is Puerto Rican. Of the 180 high school administrative assistants, none is Black or Puerto Rican.

Of the 1,610 licensed Assistant Principals of New York City junior high and elementary schools, only 7% are Black and only .2% are Puerto Rican. When the list for the position of Principal, elementary school, was originally promulgated, only 6 out of the 340 persons (or about 1.8%) were Black and none was Puerto Rican; and when the list for Principal, high school

was promulgated, none of the 22 licensed people was Black or Puerto Rican. The promulgated list of licensed Assistant Principals for junior high schools reveals that only 55 out of 690 persons (or 8%) were Black and none was Puerto Rican.

Plaintiffs contend that the written and oral examinations of the Board are the major factor accounting for this extremely low percentage of Black and Puerto Rican supervisors in a school system where 55% of the students are Black or Puerto Rican. Plaintiffs summarize their basic argument as follows:

> "[T]hese tests place a premium on familiarity with organizational pecularities of the New York City school system which, while having little to do with educational needs, are largely gained through coaching and assistance from present, predominately white, supervisory personnel.
>
> * * * * *
>
> "The testing procedures do not indicate a candidate's ability to do the job being tested for. There is no evidence that they measure merit or fitness, they have never been validated, and they are unreliable psychological instruments." Amended Complaint ¶¶22, 23.

Rather than risk the endless delay that would be encountered while the parties obtained this essential evidence through pretrial discovery procedures, we directed the parties, in view of the importance of the issue, to use their best efforts to agree on a procedure whereby the Board of Examiners and the Board of Education would compile the necessary racial statistics.

All parties cooperated fully and at considerable effort in working out almost all of the details of the procedure to be followed. Such differences as existed were resolved by court order.[14] The result has been that after months of research we have been presented with the pass-fail statistics for the relevant racial and ethnic groupings of candidates for 50 supervisory examinations given over the past few years. In view of plaintiffs claims that the examinations had a "chilling effect" inhibiting Black and Puerto Ricans from becoming candidates, this statistical survey ("the Survey") also includes figures as to those candidates who "Did Not Appear" to take the written test, which commenced the examination process, or who "Withdrew," i.e., took the written test but did not appear for subsequent parts of the examination.[15]

All parties and amici have submitted briefs as to the relevance of the statistics thus adduced and the inferences that may be drawn from them. The parties also submitted affidavits by statistical experts. A hearing was held, at which each side's expert testified and was subject to cross-examination; and we heard more oral argument on the statistical data. After declining the opportunity to examine and cross-examine any other witnesses, including those presented by affidavit, both sides rested on the record thus adduced.[16]

Upon the evidence thus presented we find that the

examinations and testing procedures prepared and administered by the Board for the purpose of determining which candidates will be licensed as supervisory personnel have the effect of discriminating against Black and Puerto Rican candidates.

The Survey reveals that out of 6,201 candidates taking most of the supervisory examinations given in the last seven (7) years, including all such examinations within the last three (3) years, 5,910 were identified by race. Of the 5,910 thus identified, 818 were Black or Puerto Rican and 5,092 were Caucasian. Analysis of the aggregate pass-fail statistics for the entire group reveals that only 31.4% of the 818 Black and Puerto Rican candidates passed as compared with 44.3% of the 5,092 white candidates.[17] Thus on an overall basis, white candidates passed at almost 1 1/2 times the rate of Black and Puerto Rican candidates. These overall figures, however, tell only part of the story. Of greater significance are the results of two examinations which had by far the largest number of candidates, those for Assistant Principal of Day Elementary School and Assistant Principal of Junior High School, which revealed the following:

EXAMINATION	CAUCASIAN		BLACK		PUERTO RICAN		BLACK AND PUERTO RICAN		PROBABILI OF CHANCE RESULT LE THAN --
	Total	%Pass	Total	%Pass	Total	%Pass	Total	%Pass	
Assistant Principal, Day Elementary Schools, 1965 Examination (PF-03)	1171	61.3%	278	45.68%	7	28.57%	285	45.26%	1/1 milli
Assistant Principal, Junior High Schools, 1968 Examination (PF-43)	1319	48.82%	236	26.27%	14	14.29%	250	25.60%	1/1 milli

* Table adapted from Affidavit of plaintiffs' expert, Professor Jacob Cohen, May 6, 1971, ¶5. The computations of probability are his; the racial statistics come directly from the Survey.

Thus white candidates passed the examination for Assistant Principal of Junior High School at almost double the rate of Black and Puerto Rican candidates, and passed the examination for Assistant Principal of Day Elementary School at a rate one-third greater than Black and Puerto Rican candidates. The gross disparity in passing rates on these two examinations is of particular significance not only because they were taken by far more candidates than those taking any other examinations conducted in at least the last seven years, resulting in licensing of the largest number of supervisors, but also because

the assistant principalship has traditionally been the route to and prerequisite for the most important supervisory position, Principal. To the extent that Black and Puerto Ricans are screened out by the examination for Assistant Principal they are not only prevented from becoming Assistant Principals but are kept out of the pool of eligibles for future examinations for the position of Principal as well. The fact that the process involves a series of examinations and that to reach the top one must pass several examinations at different times in his or her career serves to magnify the statistical differences between the white and non-white pass-fail rates. For instance, if we take a group of 100 Black and Puerto Rican candidates, on the one hand, and 1,000 white candidates, on the other, and assume a passing rate of 25% for the former and of 50% for the latter on a given assistant principal's examination (as was approximately the case in the examination for Assistant Principal of Junior High School), the results would be as follows:

Black & Puerto Rican	25% x 100 = 25)	Licensed Assistant Principals
White	50% x 1000 = 500)	

The group of 525 licensed assistant principals would then form the pool of eligibles for the related principal's examination. Assuming the same relative pass rates, we have the following results:

Black & Puerto Rican	25%	x	25	=	6.25)
					) Principals
White	50%	x	500	=	250)

Thus the true resulting difference between the Black and Puerto Rican versus the white pass rates would be even more substantial: only 6.25% of the Blacks and Puerto Ricans would pass the two successive examinations as against 25% of the whites.

When we look at all 50 examinations which were the subject of the Survey, we find that only 34 were taken by at least one member of both the white and Black-Puerto Rican racial groups. One of these examinations (Assistant Administrative Director, given Dec. 1967, PF-17) was passed by everyone taking it. Another (Director, Bureau for Children with Retarded Mental Development, given Jan. 1968, PF-18) was not completed successfully by anyone taking it.[18] There remain 32 examinations where one or the other of the two main racial groups -- Black and Puerto Rican in one group and white in the other -- had a larger percentage passing than did the other group. Of these 32 examinations the white group had a larger percentage passing in 25 examinations and the non-white group had a larger percentage passing in only 7 examinations. Thus the whites passed at a proportionately higher rate in three times as many examinations as the non-whites. The probability of these results occurring by chance is less than 1.05 in 1,000. Plaintiffs' Exhibit 2 to

oral hearing of 5/21/71. See also transcript of oral hearing of 5/21/71 at 14-19.

Plaintiffs offered the testimony of Dr. Jacob Cohen, an expert in the field of statistics, in support of the validity and significance of the Survey results. The Board, in turn, adduced the testimony of Dr. Nathan Jaspen, an expert in the same field, in opposition. Both witnesses possess outstanding qualifications. After reviewing their testimony and appraising them as witnesses, we are more persuaded by the testimony of Dr. Cohen with respect to certain crucial matters affecting the significance of the figures for present purposes.

Turning first to the gross aggregate pass-fail statistics, which reveal that the overall pass rate of white candidates (44.3%) was almost half again as high as the non-white rate (31.4%), Dr. Cohen testified that on the basis of such a large sample (5,910 out of 6,201 candidates), the test results were especially valuable and formed a sound basis for drawing valid statistical conclusions as to the difference in passing rates between the ethnic groups involved. In analyzing the statistics he used the Chi-Square Test (Yates-corrected), which is a method using formulas generally accepted by statistical experts to determine whether an observed difference in any given sample is greater than that which would be expected on the basis

of mere chance or probability. He found with respect to the aggregate test that by "the Chi-Square (Yates-corrected) statistical test, the probability of the difference being a chance result not related to the factor of race is determined as less than one in one billion." (Emphasis added)

In an effort to rebut Dr. Cohen's analysis the Board, after first dismissing the aggregate figures as insignificant on the ground that the "examinations are discrete competitions related to widely-varied, particular supervisory examinations" (Second Supp. Mem. 5/7/71, p. 7), offered Dr. Jaspen's testimony that he did not compute probabilities on the basis of the gross aggregate figures because of the possibility of "overlap," i.e., the taking of more than one test by the same persons. We reject this excuse for several reasons. In the first place, the Board, although it had the data as to any overlap within its control and was afforded the opportunity to adduce any relevant evidence, chose not to do so. Under such circumstances we cannot assume any significant overlap. Secondly, if a "random" overlap existed (i.e., one where the number of persons repeating an examination because of a previous failure approximates those taking a second, more advanced examination after passing the first), it would not substantially affect the probabilities. Dr. Jaspen conceded, for instance, that a random overlap of as much as 50% would not

substantially affect the significance of the observed difference between the white and non-white pass rates. Lastly, Dr. Cohen (plaintiffs' expert) testified that because of the large Chi-Square value an overlap would not significantly affect the probability data. In other words, the observed difference between the aggregate pass-fail rates of whites and non-whites was too great to be a mere matter of chance, unrelated to race (the chance of such an occurrence being less than one in a billion) so that even if the probability were reduced somewhat because of overlap the figure would still be significant, e.g., one in one million, or one in 500,000, and if the overlap were no greater than 15%, the statistical results would not be affected at all.

Turning to the 50 examinations forming the raw material of the Survey, some were taken by very few people. For instance, 41 of the 50 examinations were taken by only 83 (or 10.1%) of the total number of Black and Puerto Rican candidates. Because of the smallness of the sample in each instance the resulting figures of each such examination, when analyzed individually, cannot be accorded much weight or significance for our purposes. Although statisticians can analyze very small samples through use of a method called the Fisher Exact Probability Test in conjunction with the Chi-Square (Yates-corrected) Test, in our opinion such a sample is less reliable than analyses based on

larger samples, even after making allowances for greater margins of error in use of the small sample. Use of the small sample involves more extrapolation and theory superimposed on less fact. We prefer the greater fact content found in the larger sample. For the reasons explained by Dr. Cohen -- principally the risk of spurious differences based on insufficient evidence -- we do not believe that meaningful conclusions as to differences can be drawn from the meagre data derived from any one of these 41 examinations.

Turning to the 9 examinations taken by 10 or more Black and Puerto Rican candidates,[19] we find that Blacks and Puerto Ricans passed at a lower rate than whites in all of these examinations and at a rate traditionally accepted by statisticians as statistically significant in 5 out of the 9 examinations. If we limit our analysis even further to those 6 examinations which were taken by a minimum of 18 candidates from each of the two groups (white, on the one hand, and Black and Puerto Rican, on the other), the results are significant. On all 6 of these examinations the percentage of whites passing is higher than the percentage of Blacks and Puerto Ricans passing, with the differences ranging from 9% to 28%.[20]

Finally we are impressed with the revealing statistics comparing the percentage of Black and Puerto Rican Principals to

white Principals in the five largest school systems in the country:[21]

City	Total No. of Principals	% Black	% Puerto Rican	% Black and Puerto Rican
Detroit	281	16.7%	---	16.7%
Philadelphia	267	16.7%	---	16.7%
Los Angeles	1,012	8.0%	1.7%	9.7%
Chicago	479	6.9%	---	6.9%
NEW YORK	862	1.3%	0.1%	1.4%

Thus New York City has by far the lowest percentage of minority representation. The next lowest city, Chicago, has almost 5 times the percentage of minority principals found in New York City, and as the following table shows there is a similar imbalance of minority Assistant Principals:

City	Total No. of Asst. Principals	% Black	% Puerto Rican	% Black and Puerto Rica
Detroit	360	24.7%	0.2%	24.9%
Philadelphia	225	37.0%	---	37.0%
Los Angeles	---	---	---	---
Chicago	714	32.5%	---	32.5%
NEW YORK	1,610	7.0%	0.2%	7.2%

Plaintiffs also argue that discrimination may be inferred from the fact that the percentage of Black and Puerto Rican Principals and Assistant Principals in New York City schools (1.4% and 7.2%, respectively) is far below the percentage of the total student body who are Black and Puerto Rican (55.8%) and when compared with similar figures for the five largest school systems in the country (New York, Los Angeles, Chicago, Detroit,

and Philadelphia) constitutes not only the lowest minority representation in the supervisory ranks, but also the lowest ratio of such minority group supervisors to minority group students. We reject this contention. Supervisors are drawn from the pool of qualified teachers, most of whom attended elementary and high school long ago, and not from present-day students. Undoubtedly the low number of minority teachers eligible to take the supervisory examinations prescribed by the Board has been due in part to the fact that the percentage of minority students who 10 or 15 years ago went on to college and qualified for a teaching career, and thus provided the source of today's minority teachers, was much smaller than the number of white students following such a course, with the result that a larger pool of qualified white graduates entered the teaching profession. In addition the minority student population in New York City has increased during the same period, with the effect of increasing the racial imbalance between teachers and students. Current efforts to promote higher educational opportunities for minority groups will not produce qualified teachers for some years. But statistics as to the current dearth of qualified minority teachers do not have probative value with respect to the question before us, which is whether New York City's examination system discriminates against minority candidates who have

already qualified as licensed teachers.

For the same reasons we are unimpressed with plaintiffs' comparisons between (1) the percentage of Black and Puerto Rican members of the general population in New York City, and (2) the percentage of Black and Puerto Rican Principals and Assistant Principals found in the City's total school supervisory personnel. Statistical comparisons to the general racial population of the community may be relevant in determining whether there is discrimination in job opportunities that are supposed to be open to the general public, see, e.g., Arrington v. Mass. Bay Transp. Auth., 306 F. Supp. 1355 (D. Mass. 1969) (bus drivers); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Calif. 1970) (policemen), in the selection of teachers from a pool of those already qualified and eligible for appointment, e.g., Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969), affd., 431 F.2d 1254 (3d Cir. 1970) (per curiam), or in qualification of voters or jurors, Smith v. Texas, 311 U.S. 128 (1940); Jones v. Georgia, 389 U.S. 24 (1967); Coleman v. Alabama, 389 U.S. 22 (1967); Swain v. Alabama, 380 U.S. 202, 208-09 (1967). But we are here dealing with candidates who must meet preliminary eligibility requirements as to education and experience that are not possessed by most of the general population. Where the education of our children is at stake, such insistence upon the highest possible quality

in our teachers is a salutary and lawful objective, provided it does not result in racial discrimination between candidates who are otherwise eligible, which is the case here.

Notwithstanding the introduction of some evidence thus found irrelevant, the evidence establishes to our satisfaction that the examinations prepared and administered by the Board for the licensing of supervisory personnel in New York City schools do have the de facto effect of discriminating significantly and substantially against qualified Black and Puerto Rican applicants However, the existence of such discrimination, standing alone, would not necessarily entitle plaintiffs to relief. The Constitution does not require that minority group candidates be licensed as supervisors in the same proportion as white candidates. The goal of the examination procedures should be to provide the best qualified supervisors, regardless of their race, and if the examinations appear reasonably constructive to measure knowledge, skills and abilities essential to a particular position, they should not be nullified because of a de facto discriminatory impact. We accordingly pass on to the question of whether the examinations under attack can be validated as relevant to the requirements of the positions for which they are given, i.e., whether they are "job-related."

The parties disagree as to which side bears the burden

of proving that the examinations are job-related. Plaintiffs contend that once a discriminatory impact is shown the burden is on the Board to show a compelling necessity or justification for tests having an unintended discriminatory effect, citing Griggs v. Duke Power Co., ___ U.S. ___, 91 Sup. Ct. 849 (1971); Arrington v. Mass. Bay Transp. Auth., 306 F. Supp. 1355, 1358 (D. Mass. 1969); Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Cal. 1970); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970). Most of these decisions arise under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e, et seq., which embodied an express Congressional policy directed toward the consequences of certain employment practices, regardless of the employer's motive or interest, and interpreted by the Supreme Court as placing on the employer the burden of showing that any given testing mechanism or requirement has a manifest function in measuring a candidate's capability of performing the employment in question. See Griggs v. Duke Power Company, ___ U.S. ___, 91 Sup. Ct. 849, 854 (1971). Since we are here concerned, however, with whether the Board's examinations meet the requirements of the Equal Protection Clause rather than those of a specific Congressional enactment, the foregoing authorities, while relevant, are not controlling.

The Board contends that in a Constitutional framework plaintiffs must show that there is no rational relationship between

the examinations and the requirements of the supervisory positions for which they are given, relying on a line of cases that include Dandridge v. Williams, 397 U.S. 471, 485 (1970), and Chaney v. State Bar of California, 386 F.2d 962, 964 (9th Cir. 1967), cert. denied, 390 U.S. 1011 (1968).

Although the "rational relationship" standard has been applied to practices attacked as causing commercial or economic har[illegible] e.g., McGowan v. Maryland, 366 U.S. 420, 426 (1961) (statute forbidding sale of certain items on Sunday and not others); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (regulating drilling for natural gas); Morey v. Doud, 354 U.S. 457, 463, 464 (1957) (regulating use of premises as "currency exchanges"); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1954) (regulating the sale of eye glasses); Ft. Smith Light Co. v. Paving District, 274 U.S. 387 (1926) (imposing duty to repair on street railways), we are here dealing with racial, not economic, discrimination, where even reputed strict constructionists have joined in the view that a more stringent standard must be applied. See Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), and dissenting opinion of Justice Harlan in Shapiro v. Thompson, 394 U.S. 618, 659 (1969). Where official conduct discriminates as to race, it is "constitutionally suspect," Bolling v. Sharpe, 347 U.S. 497,

499 (1954), subject to "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), and bears a "very heavy burden of justification," Loving v. Virginia, 388 U.S. 1, 9 (1967), regardless of lack of intent to discriminate racially, see Hobson v. Hansen, 269 F. Supp. 401, 426, 497 (D.D.C. 1967), affd. sub nom. Smuck v. Hobson, 408 F.2d 175 (D.D.C. 1969). In a closely parallel situation arising under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e, et seq. in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), the Supreme Court pointed out that "good intent or absence of discriminatory intent does not remedy employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability...." See also, Baker v. Columbus Municipal Separate School District, ___ F. Supp. ___ (N.D. Miss. June 23, 1971); Western Addition Community Organization v. Alioto, ___ F. Supp. ___ (N.D. Cal. June 8, 1971).

We are satisfied that where, as here, plaintiffs show that the examinations result in substantial discrimination against a minority racial group qualified to take them, a strong showing must be made by the Board that the examinations are required to measure abilities essential to performance of the supervisory positions for which they are given. Shapiro v. Thompson, 394 U.S. 618, 627 (1969); Arrington v. Mass. Bay Transp.

Auth., 306 F. Supp. 1355, 1358 (D. Mass. 1969); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970).

Before considering the evidence with respect to the validity, reliability and objectivity of the examinations conducted by the Board, a few general principles must be stated. It seems to be generally accepted that before an examination will be recognized as a reliable instrument for measuring the fitness and ability of a candidate to perform tasks demanded by a given position, the examination should be validated, i.e., shown to be reasonably capable of measuring "what it purports to measure." O. G. Stahl, Public Personnel Administration, p. 71 (5th ed. 1962). The first step toward this basic objective is to insure that as to subject matter the examination will elicit from the candidate information that is relevant to the job for which it is given. If so, it is described as having "content validity." Otherwise the examination could be a useless and misleading tool. For instance, an examination eliciting information required to perform a bus-driver's job would hardly be relevant in determining a candidate's capacity to perform the duties of a policeman, lawyer or accountant.

In constructing an examination that will have "content validity," the preferred course is first to have an empirical analysis made of the position for which it is given, usually by

experts or professionals in the field. Such an analysis requires a study to be made of the duties of the job, of the performance by those already occupying it, and of the elements, aspects and characteristics that make for successful performance. Questions are then formulated, selective procedures established, and criteria prepared for examiners that should elicit information enabling them to measure these characteristics, skills and proficiency in a candidate and determine his capacity to do the job satisfactorily.

As Professor R. L. Thorndike has observed:

> "Whenever a test is being tried for selection of personnel for some job specialty, it is most desirable that it be validated empirically. Experimental evidence is called for to show that the test is in fact effective in discriminating between those who are and those who are not successful in a particular job. Though it may be necessary under the press of an emergency to rely upon the professional judgment of the psychologist to establish the value of a test for personnel selection, this must be recognized as a stop-gap." R. L. Thorndike, Personnel Selection 5-6 (1949). See also, R. L. Thorndike & E. Hagen, Measurement and Evaluation in Psychology and Education 616-41 (1969); cf. 29 C.F.R. §1607.5 (Jan. 1, 1971).

To a lesser extent the validity of an examination as a means of selecting candidates best suited for a position may also be checked or verified empirically by comparing the relative examination scores of successful candidates with their later performance on the job. If there is a significant

correlation between test scores and later performance, the examination has "predictive validity." Predictive validity is of greater significance in evaluating aptitude tests than proficiency tests. Furthermore it often takes a long time to establish such validity and even then the evaluation depends upon the reliability and fairness of the field appraisal of performance on the job.

Lastly, an examination must, of course, be administered objectively, free from bias or prejudice in favor of or against particular candidate or group, if it is to be a useful selection tool.

At the outset of the hearings, being inexperienced in the field of examinations generally, we indicated doubt as to whether examinations could be constructed that would be valid for selection of Principals and other supervisory personnel, since we viewed their duties as being executive and complex in nature, with the success of a Principal in a given school depending not so much on his knowledge of duties and educational content of courses given by his subordinates as on such intangible factors as leadership skill, sensitivity to the feelings and attitudes of teachers, parents and children, and ability to articulate, to relate, to organize work, to establish procedures, to promote good community relations, to induce

subordinates to accept directions, to work cooperatively, to criticize without creating unnecessary animosity or ill-will, to analyze and evaluate administrative problems, to take decisive action when required, to operate under stress, to initiate and promote new programs, and to instill a feeling of confidence. In short we questioned whether tests that might be valid for purposes of determining a candidate's knowledge of the duties of a position or of detailed educational information would be valid for purposes of determining his judgment and ability as an executive, particularly since the candidate, being a licensed teacher, has already demonstrated his or her technical skills in certain fields of education, including ability to read, write and speak English.

Notwithstanding our doubt, both sides in this dispute agree that while examination procedures may have weaknesses in testing for higher level executive positions, such procedures (including use of written tests) are essential tools in selecting supervisory personnel. However, they differ as to the areas of weakness. Plaintiffs, for instance, state that "content validity is of limited utility in selecting persons for fairly sophisticated or complex job" because of the difficulties faced in preparing tests that fairly sample the job and accurately predict a candidate's performance. See

F. Freeman, Theory and Practice of Psychological Testing, p. 91 (3d ed. 1963); A. Anastasi, Principles of Psychological Testing, pp. 100-04 (3d ed. 1968). According to plaintiffs, examinations for such positions are useful only if they have predictive validity, since content validity is primarily relevant for the purpose of determining whether a candidate has learned a defined body of knowledge rather than for the purpose of determining how he will use and apply that knowledge on the job. The Board, on the other hand, takes the view that content validity is more important in determining a candidate's proficiency or capacity to perform the duties of a Principal, and that predictive validity should be de-emphasized in judging the utility of such tests because predictive validity is more relevant to aptitude for learning than to achievement or proficiency for satisfactory performance on the job. The Board further points out that follow-up studies used to determine predictive validity are not generally used in licensing of doctors, lawyers, or other professionals.

The typical supervisory examination consists of two parts: (1) a written test, and (2) an oral interview. In addition, a problem-based conference test has been used in some years for examinations for positions such as Assistant Director and Director. The percentage weight attributed to each part of

the examination varies according to the supervisory position involved. Usually about 45 to 50% is accorded to the written examination and 25 to 30% to the oral examination and another 25 to 30% to an appraisal of the candidate's training and experience, record, written English, and physical and medical condition. More recently in an examination given for license as Principal of a Day Elementary School the written and oral interview tests were weighted 50% each with no weight apparently being given to the other factors mentioned above.

In the past the written test has usually consisted of an essay portion and a short-answer section, the latter consisting of a series of approximately 200 multiple choice questions, each of which requires an answer-number to be selected and registered by the applicant on a separate answer sheet. The oral interview is conducted by a committee of three examiners. A hypothetical problem situation that might be encountered by a principal or supervisor in the course of administration (e.g., problem in human relations, teacher training, or administration of a program) is put before the candidate, followed by questions to which he or she responds orally at some length. The committee then evaluates the applicant's speech, grammar, clarity of expression, comprehension of the problem, definiteness and practicality of his or her proposals, soundness of judgment,

ability to present ideas and meet challenges, poise, courtesy and similar qualities. Recently the examination for Principal has changed to consist of only an essay type test, with the short-answer portion deleted for the reason that it was largely a matter of memory. However, the short-answer section has been retained in at least some written examinations for Assistant Principal, which is an essential stepping-stone to the position of Principal.

The Board contends that its examinations are valid, reliable and objective. It points to several steps taken in an effort to achieve and maintain these goals. It asserts that for each examination it has obtained from the Board of Education a statement of the "duties of the position" for which the examination is to be given. A committee or panel of experts is then assembled to specify those responsibilities considered most significant. According to the Board, well known interested educators and lay persons are also consulted with respect to the qualities for which a candidate is to be tested. With the aid of these committees, educators and lay persons, the Board's staff then constructs questions designed to elicit the knowledge and skills required of a person holding the supervisory position for which the examination is given.

According to the Board it achieves objectivity in the

scoring of written examinations by use of code book numbers on test papers, which conceal the applicant's identity, by submitting answers on any test to more than one scorer, by use of detailed objective rating guidance, and by having answers to essay questions rated by different committees so that no one individual is responsible for rating of an entire examination paper. Oral interviews are each administered by panels of three experts.

In support of its position the Board has submitted affidavits of several respected leaders in the field of educational testing[22] to the effect that they have reviewed the Board's testing procedures and some of the tests prepared by the Board and have concluded that the Board has used acceptable procedures for designing examinations having content validity:

> "In general, the Board of Examiners appears to have made a conscientious and informed attempt to develop test tasks that do correspond to selected ones of the specifications set forth by the supervisory persons who set out the requirements for the job." (Aff. of Dr. Robert L. Thorndike, dated October 9, 1970)

> "The approach used by the Board of Examiners in determining the validity or relevance of its tests consists essentially of a strategy which relies on the judgments of experts and consensus among them as to what constitutes an appropriate test item." (Aff. of Dr. Aaron Carton, dated October 25, 1970)

As thus described, the Board's methods and procedures seem reasonable enough to one lacking expertise in the field of

educational testing, and normally we would be prepared to accept the Board's views on the subject. Indeed, there appear to be few differences between the procedures advocated by the Board and by plaintiffs' expert, Dr. Richard S. Barrett. The basic aims of both are the same (to achieve validity, reliability and objectivity), with the parties differing as to the need for and importance of predictive validity in administration of supervisory examinations. However, a major stumbling block -- and in our view a fatal weakness in the Board's system -- lies in the methods used by the Board to implement the techniques and procedures adopted in principle and approved by independent experts. As is often the case in such difficult and complex matters, theory is one thing, practice may be another. Despite its professed aims the Board has not in practice taken sufficient steps to insure that its examinations will be valid as to content, much less to predictiveness. For example, in support of the Board's content validation procedure Dr. Murray Rockowitz, a member of the Board with primary responsibility for research and development, includes the name of Peter J. Strauss, member of Local School Board No. 2, as one of the "experts" or "well known interested lay persons" consulted at a meeting on December 12, 1969 for advice on qualities being tested for in the construction of an examination for Elementary School Principal, which was given on November 3,

1970. (Rockowitz Aff. dated Oct. 26, 1970). In reply Mr. Strauss has submitted his affidavit to the effect that the meeting was not called for the purpose of obtaining views on the qualities to be tested for or to discuss appropriate selection criteria, but for other purposes and that these steps were initiated by dissatisfied consultants, with nothing being accomplished. Mr. Strauss states:

> "It is my recollection of the meeting that the ensuing discussion of the qualities to be sought in a candidate was initiated by the consultants, not by Mr. Rockowitz or any other representative of the Board of Examiners. Many of us expressed our dissatisfaction with the adequacy and relevance of the qualities which the Board of Examiners was apparently intending to test for, based on the established 'duties of the position.' We indicated that in our view it was essential to test for qualities which traditionally have never been considered by the Board of Examiners in examining principals.
>
> "5. The meeting concluded without any sort of consensus or agreement having been reached between the consultants present at the meeting and the members of the Board of Examiners and their assistants present. There was never any follow-up to the meeting.
>
> "6. To my knowledge, the 'duties of the position' previously established were in no way varied or modified as a result of the meeting. On August 28, 1969 the Board of Examiners issued an announcement for an examination for the position of Principal, Day Elementary School. Said announcement included a listing of the 'duties of the position.'" (Aff. Peter J. Strauss, dated Nov. 4, 1970).

It also appears that Harvey B. Scribner, the Chancellor

of the New York City School District, a distinguished and fearless educator, does not share the Board's confidence in the validity of its examinations. In a memorandum to the Board of Education dated October 13, 1970, Dr. Scribner noted that he was "pressed to evaluate whether the present examination and licensing system, which dictates specific limitations of employment and promotion of staff for the public schools, is a help [or a hardship [in the efforts of community boards to operate]....] He recommended that in lieu of current employment practices the Board adopt New York State certification, plus such criteria as each community board might prescribe for those to be selected by it, as the minimum requirement for employment in New York City public schools. He concluded:

> "For the reasons outlined in this position paper, my position with regard to the Chance and Mercado case is that I prefer not to defend myself against the action. To do so would require that I both violate my own professional beliefs and defend a system of personnel selection and promotion which I no longer believe to be workable. We are facing a future in education which leaves no alternative to the selection of the most creative teachers; the most talented supervisors; the most able principals and other administrators who possess the highest level of leadership qualities possible from wherever they may be found and as are available at any given time."

Digging deeper, we find to our dismay that the Board's position does not appear to be supported by most of the research reports submitted by it as demonstrating the content validity of

its supervisory examinations. Many of the reports are irrelevant, since they concern teachers', not supervisors', examinations; or they deal with objectivity or consistency; or they are mere proposals, not studies. One report merely measures the attitudes of the assistant examiners towards the "observed teaching test." Another attempts to correlate the similarity of a 300-word English test with a 450-word English test. One report relied on by the Board does deal tangentially with the predictive validity of the examinations. It is based on a pilot study, admittedly very meager in scope. The test results showed that there was little or no correlation between success on the tests and job success (in some cases the control group did better, in others the experimental group did better, in some cases there was no statistical difference). There was no attempt in this pilot study to determine whether those who scored lower on the examination (but passed) did less well as Principals. Neither was there an attempt to determine whether those who failed the examination but who are Acting Principals are rated as successful or unsuccessful on the job. In only two out of the six years tested (1946 and 1966) did the differences reach statistically significant levels in favor of the Board's position, and in those two years the report candidly admitted: "... the relatively small population of the samples involved should be noted."

Finally, the entire study reveals only the mean rank order of the examination scores.

Reluctant as we are to invade a profession characterized by an expertise not shared by us, we must conclude on the record before us that while the Board has adopted procedures designed for content validity, it does not appear in practice to have achieved this goal. Our conclusion, which is based upon our appraisal of affidavits of experts furnished by the parties, is confirmed by our own study of some of the examinations themselves. Turning first to the short-answer, multiple-choice tests, many of the questions strike us as having little relevance to the qualities expected of a school supervisor. Some examples are cited in the margin.[23]

A review of the balance of a typical short-answer test and, indeed, of the essay type test reveals that the questions appear to be aimed at testing the candidate's ability to memorize rather than the qualities normally associated with a school administrator. This impression is confirmed by a well known publication widely used by candidates to prepare for supervisory examinations, which is entitled "PRINCIPAL, ASSISTANT-TO-PRINCIPAL" by Paul Treatman, Ph.D., Principal, New York City Public Schools (Teacher License Series, ARCO). With respect to the short-answer test it advocates a course of training in

memorization, or mnemonics, including study of Regents' review books, multiple choice parts of previous examinations and the like. Interesting and instructive as would be the reading of the underlying works, the emphasis is on superficial mnemonics. The ability to memorize and regurgitate laundry lists of bad answers is not, we hope, a true test of a candidate's qualifications for a supervisory position.

The inadequacy of such testing procedures led the Board finally to drop the short-answer test for Principal because, as Dr. Isidore Bogen, a Board member stated, "The Board of Examiners felt it was largely a matter of memory." Notwithstanding this frank admission, the short-answer examination has been retained in tests for Assistant Principal, apparently on the theory that an Assistant Principal should know the content of the curriculum taught by teachers under his supervision. While we might be prepared to accept this compromise if it were the sole objectionable feature, the same weakness is found in many of the essay question tests, which one would expect to be used for the purpose of eliciting some of the qualities required of a Principal (e.g., accurate grammar, clarity of expression, organization and presentation of ideas, and creating thinking) as well as the candidate's reaction to problems and his judgment and ability in analyzing and solving them. Many essay questions,

however, appear to be aimed solely at the ability to memorize "duties." Indeed the Treatman manual, supra, gives the following advice to candidates preparing for essay questions:

> "One step in this direction is the mastery of mnemonic devices, such as those found in the previous chapter, that help organize your knowledge of curriculum. Another and related valuable approach is the mastery and use of a set of mnemonic devices which will help organize your knowledge and experience in administrative and supervisory aspects of school life. Such a set of mnemonics appears below. In answering any essay question which seems to lend itself to menemonic application, the candidate will have to use his own good judgment in deciding which elements of which devices are most appropriate for use. Blind exploitation of every element in a mnemonic device might result in a fatal waste of time.
>
> * * * * *
>
> "A careful study of these sample answers will reveal to the candidate the technique of writing concise, credit-laden statements that outlined model answers cannot reveal. The author is convinced that the outlined model answer teaches little or nothing to the candidate, who must still see, and learn to write in, a terse style, employing many concrete illustrations, and following, wherever possible, a recognizable organization...." ("Principal, Assistant-To-Principal" by Paul Treatman, supra at 212-13)

Samples of some mnemonic methods and professional jargon suggested by the author are given in a footnote.[24]

Turning to the oral interview and conference tests, we are handicapped in our ability to appraise their validity

by the absence of any tangible, objective data, since the principal qualities that should be evaluated by the examining committee in the oral interview (e.g., leadership, speech, poise, comprehension, soundness of judgment and ability to present ideas and meet challenges) are intangible, and the judgment of the interviewing committee can only be as sound as the capacity of its members to recognize the presence or absence of these qualities in each candidate. In the absence of any record of such interviews or of any proof that the examiners are incompetent or that the interview problems or questions have been irrelevant, we make no finding as to the content validity of the oral examinations, standing alone.

With respect to the question of the objectivity of the examinations, adequate precautions appear to have been taken by the Board to assure objectivity in the conduct of the written examinations. As for the oral interviews, we are not persuaded by vague and speculative hearsay statements that members of the examining committees intentionally discriminate against Black or Puerto Rican candidates because of their color, use of "southernisms," or the like. (See Aff. of Edythe J. Gaines). Since each candidate has already been licensed as a teacher and has received New York State certification for a supervisory position, the examiners are dealing with a group of well educated

applicants. On the other hand, the hard, cold facts are that all members of the Board of Examiners are white, the great majority of the oral examiners or examination assistants are white, and white candidates have passed the combined oral and written tests at a much higher rate than Black and Puerto Rican candidates, resulting in de facto discrimination against the latter.[25] This raises a "serious and substantial question" as to whether discrimination against Black and Puerto Ricans is not being unconsciously practiced by white interview examiners. See Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969).

CONCLUSION

The evidence reveals that the examinations prepared and administered by the Board of Examiners for the licensing of supervisory personnel, such as Principals and Assistant Principals, have the de facto effect of discriminating significant and substantially against Black and Puerto Rican applicants.

Despite the fact that candidates for such positions are licensed teachers who have satisfied prerequisites as to education and experience established by the Board of Education for supervisory positions and have already been certified by the State of New York for the positions sought, a survey of the results of examinations taken by 5,910 applicants (of whom

818 were Black or Puerto Rican) reveals that white candidates have received passing grades at almost 1 1/2 times the rate of Black and Puerto Rican candidates and that on one important examination given in 1968 for the position of Assistant Principal, Junior High School, white candidates passed at almost double the rate of Black and Puerto Rican candidates. (See pp. 12-13, supra) The discriminatory effect in the latter case is aggravated by the fact that the Assistant Principalship has traditionally been an essential prerequisite to the more important supervisory position of Principal. (See pp. 13-14, supra).

The existence of such de facto racial discrimination is further confirmed by the fact that only 1.4% of the Principals, and 7.2% of the Assistant Principals in New York City schools are Black or Puerto Rican, percentages which are far below those for the same positions in the four other largest city school systems in the United States. (See pp. 19-20, supra) For example, the percentage of Black and Puerto Rican Principals in each of the cities of Detroit and Philadelphia is 16.7%, or 12 times as high as that in New York.

Such a discriminatory impact is constitutionally suspect and places the burden on the Board to show that the examinations can be justified as necessary to obtain Principals, Assistant Principals and supervisors possessing the skills and

qualifications required for successful performance of the duties of these positions. The Board has failed to meet this burden. Although it has taken some steps towards securing content and predictive validity for the examinations and has been improving the examinations during the last two years, the Board has not in practice achieved the goals of constructing examination procedures that are truly job-related. Many objectionable features remain, with the result that some 37 minority Acting Principals and 131 minority Acting Assistant Principals, who are considered fully qualified and are desired for permanent appointment by the community school boards, are rendered ineligible for such permanent appointment. A study of the written examinations reveals that major portions of them call simply for regurgitation of memorized material. Furthermore, the oral examination procedure leaves open the question of whether white candidates are not being favored -- albeit unconsciously -- by committees of examination assistants who have been entirely or predominantly white.

There appears to be a strong likelihood that plaintiffs will prevail on the merits at trial. It further appears that plaintiffs would suffer greater harm from denial of preliminary injunctive relief than defendants would suffer from the granting of relief. Denial of relief would perpetuate existing racial

discrimination, depriving plaintiffs and others similarly situated of an equal opportunity for permanent appointment and licensing as supervisors. During the long period before the case would finally be adjudicated on the merits, permanent appointments would be made from lists promulgated by the Board, which would have the effect of threatening the continued employment of those holding acting appointments, since New York law requires vacancies to be filled from the eligibility lists if such lists exist. N.Y. Educ. Law §2573(2); Board of Education By-Laws §101(3).

Granting of preliminary relief, it is true, will temporarily prevent the appointment from eligible lists of those who have, after the arduous process of taking the existing type of examinations, successfully passed and been placed on the eligible list. However, they will not be denied an equal opportunity in the future to qualify under such examination procedures as are found to be constitutionally permissible and, pending trial of the case, they would be eligible for appointment as Acting Principals or Acting Assistant Principals. Thus the balance of hardships tips decidedly in favor of plaintiffs, and, pending final determination of the merits, the effect of preliminary relief would be to preserve the status quo until the issues are resolved. Checker Motors Corp. v. Chrysler Corp.,

405 F.2d 319, 323 (2d Cir. 1969).

Having in mind that the existing examination system is not believed by the Chancellor of the New York City District to be a workable one, we do not envisage any great harm to the public as a result of preliminary relief. On the contrary, such relief may possibly lead the Board of Examiners, after taking another hard look at its examination procedures, to consider an overhaul that will not only eliminate racial discrimination, but lead to procedures that will be more adaptable to the Community School Board type of administration.

Lastly we cannot overlook the fact that various persons having the duty of selecting supervisory personnel, such as members of community school boards, have stated in affidavits filed with the court that they have often found that holders of licenses from the Board of Examiners do not possess the ability to perform the duties of a supervisory position for which a candidate is sought, with the result that in order to select qualified personnel it has been necessary to appoint unlicensed candidates on an acting basis. (See Affs. of Dr. Edwin J. Haas, Edythe J. Gaines, and Peter J. Strauss).

For the foregoing reasons a preliminary injunction will issue restraining defendants from (1) conducting further examinations of the type found to be unconstitutionally

discriminatory against Blacks and Puerto Ricans, and from (2) promulgating eligible lists on the basis of such examination procedures.

The foregoing shall constitute our findings of fact and conclusions of law as required by Rule 52(a), F.R.C.P.

We take this opportunity to express appreciation to the parties for their thorough papers, and to the amici for their briefs, which were of assistance in resolving the difficult and complex issues.

Settle order on notice.

_____

U.S.C.J.

Dated: July 14, 1971.

FOOTNOTES

1. See Iolanthe, Act I:

> "Titles shall ennoble, then,
> All the Common Councilmen:
> Peers shall teem in Christendom,
> And a Duke's exalted station
> Be attained by Competitive Examination."

2. 42 U.S.C. §1981:

> "§ 1981. Equal rights under the law
> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

3. 42 U.S.C. §1983:

> "§ 1983. Civil action for deprivation of rights
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. New York Constitution Art. 5, §6:

> "§ 6. [Civil service appointments and promotions; veterans' preference and credits]
> "Appointments and promotions in the civil service of the state and all of the civil

divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive;...."

5. New York Education Law §2590-j(3)(a)(1):

"§ 2590-j. Appointment and removal of persons in the teaching and supervisory service

* * * * *

"3. (a)(1) The board of examiners shall prepare and administer objective examinations to determine the merit and fitness of all candidates for teaching and supervisory service positions, other than the positions of chancellor, executive deputy city superintendent, deputy city superintendent, assistant city superintendent and community superintendent. Examinations for teaching positions may consist in part of the National Teachers Examination administered by the Educational Testing Service of Princeton, New Jersey."

6. New York Education Law §2569(1):

"§ 2569. Board of examiners

"1. In a city having a population of one million or more there shall be a board of examiners to consist of five members, one of whom shall be the superintendent of schools of the city school district of the city of New York or a deputy superintendent thereof designated by him to act in his stead during his pleasure. No person other than the chancellor, the superintendent of schools, or a deputy superintendent so designated shall, while in the supervising or teaching service of the city, serve on such board. It shall be

the duty of the board to hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools in such city, except examiners, and to prepare all necessary eligible lists, subject to the responsibilities among the members of the board of examiners hereinafter set forth. The board shall periodically review the validity and reliability of examinations as well as examination procedures." (Emphasis added)

7. New York Education Law §2573(10):

"10. In a city having a population of one million or more, recommendations for appointment to the teaching service shall be from the first three persons on appropriate eligible lists prepared by the board of examiners. Eligible lists, including competitive and qualifying lists, shall not be merged and a list shall be exhausted or have expired before nominations are made from a list of subsequent date. No competitive or qualifying eligible list except existing principals' eligible list shall remain in force for a longer period than four years, nor have a life of less than three years, no eligible list now in force shall terminate any sooner than four years from the date on which it was promulgated. ... The board of education, on the recommendation of the superintendent of schools shall designate, subject to the other provisions of this chapter, the kind and grades of licenses which shall be required for service as principal, branch principal, director, assistant examiner in the board of examiners, supervisor or teacher of a special branch, head of department, assistant, school psychiatrist, school psychologist, school medical inspector, school aurist, school psychiatric social worker, school social case worker, research assistant, teacher-clerk,

school clerk, school secretary, clerical assistant, industrial or trade helper in vocational schools, school librarian, laboratory assistant, placement and investigation assistant, financial assistant, machine shop assistant, tool boy, or any other position of the teaching staff together with the academic and professional qualifications required for each kind or grade of license. No person required to have a license under the provisions of this chapter in order to be employed in a position who does not have such license shall have any claim for salary, except that a person who has been assigned to teach in a subject or field not specifically covered in his license but on the same rank or level of service shall be entitled to his salary."

8. Plaintiffs have also moved for a determination that this action is a class action maintainable under Rule 23, F.R.Civ.P. Although plaintiffs brought this motion on soon after their original motion for a preliminary injunction, in accordance with Local Civil Rule 11A, all parties have agreed that our decision on this class action motion would be reserved. Defendant Board of Examiners has not yet filed any papers opposing plaintiffs' motion making this action a class action. Defendants have 10 days from the date of this decision to file opposing papers. Otherwise the motion will be granted.

9. NYABSSA has a membership of approximately 300 New York City public school administrators and supervisors. Its purpose is "the attainment of an effective education for black children in the New York City School System."

10. ASPIRA is a nonprofit corporation "devoted to the improvement of the Puerto Rican communities of the United States through education and leadership development." "ASPIRA" is the Spanish word for "aspiring."

11. The PEA is a nonprofit corporation, chartered in 1899, in order "to secure and maintain the highest possible standards of public education in the City of New York."

12. N.Y. Educ. L. §§2569, 2590-j(1), (4)(b), (4)(d).

13. Telegram of Luis Mercado to Board of Examiners, Nov. 3, 1970, Exhibit B to defendant Board of Examiners' First Supplemental Memorandum of Law, received Nov. 6, 1970.

14. See Court Orders of December 29, 1970, February 16, 1971, April 13, 1971, and April 29, 1971.

15. Plaintiffs contended, inter alia, that the discriminatory effects of the examinations were and are well known to the Blacks and Puerto Ricans. Hence there was a "chilling effect" on their taking the examinations. Though we ordered these statistics on "withdrawal" and "not appearing" to be taken for the sake of completeness, we place no reliance on this argument. Merely because someone thinks an examination is discriminatory is not proof that the examination is in fact discriminatory.

16. We have based our conclusion on the statistical evidence, not on "straightforward moral and constitutional arithmetic." Hobson v. Hansen, ___ F. Supp. ___ (Civ. Action #82-66, May 25, 1971), slip opinion at 23. We are not here dealing with simple arithmetic, cf. Reynolds v. Sims, 377 U.S. 533 (1964) ("one man, one vote"), but with something approaching "constitutional calculus."

17. Of the candidates identified as Puerto Rican only, 27.59% passed; of the candidates identified as Black, 31.56% passed.

18. The one Black who took it failed; no Puerto Ricans took it; and 5 whites took it. Four failed and the last one withdrew, which in effect meant that he failed because he could not successfully complete the examination process.

19. See Affidavit of Dr. Jacob Cohen, dated May 13, 1971, ¶3, n.2, for a list of these nine examinations.

20. These examinations are:

Assistant to Principal, Day Elementary School, 4/65, PF-03
Superintendent of Home Economics, 6/67, PF-12
Superintendent, Early Childhood, 2/68, PF-20
Supervisor of Art, 3/68, PF-23
Supervisor of Music, 5/68, PF-28
Assistant Principal, Junior High School, 9/68, PF-43.

21. The sources of these statistics, which have not been disputed by defendants, are set forth in detail in Plaintiffs' Memorandum filed Sept. 24, 1970, pp. 3-4, n.2, as supplemented by letter of Elizabeth B. DuBois to the Court, dated June 11, 1971.

22. Professor Robert L. Thorndike, Teachers College, Columbia University; Dr. Marvin Sontag, Associate Professor of Psychology and Education, Teachers College, Columbia University; Associate Professor Aaron Suss Carton, State University of New York; Dr. Esiu Kaya Carton, Professor of Educational Psychology, Hofstra University.

23. 1961 Examination for Principal, Day Elementary School

"64. Of the following characters in the nursery rhyme, THE BURIAL OF POOR COCK ROBIN, the one who killed Cock Robin is the

1. Lark
2. Thrush
3. Bull
4. Sparrow"

1965 Examination for Assistant Principal, Junior High School

"211. I've Got a Little List, from the Mikado is sung by
1. Nanki-Poo 2. Pish-Tush 3. Ko-Ko 4. Pooh-Bah

"212. Arthur Sullivan of the team of Gilbert and Sullivan, wrote
1. Gypsy Love Song 2. The Lost Chord
3. Ah, Sweet Mystery of Life 4. A Kiss in the Dark

* * * * *

"218. Which one of the following violin makers is NOT of the great triumvirate of Cremona?
1. Amati 2. Stradivarius 3. Guarnerius
4. Maggini"

1968 Examination for Assistant Principal, Junior High School

"63. The author of Dodsworth is also the author of:
1. Daisy Miller
2. Elmer Gantry
3. Henry Esmond
4. Mrs. Dalloway

* * * * *

"74. The author of Tender is the Night also wrote:
1. The Great Gatsby
2. Butterfield 8
3. The Sun Also Rises
4. Sanctuary

"75. A contemporary play in which one of the characters seems to turn into a rhinoceros was written by:
1. Beckett
2. Pintor
3. Ionesco
4. Shaw"

24. "OBJECTIVES OF ELEMENTARY EDUCATION

Cohotkase

Character
Our American Heritage
Health
Exploration
Thinking
Knowledges and Skills
Appreciation and Expression
Social Relationships
Economic Relationships

* * * * *

"DEVELOPING A LEARNING EXPERIENCE

Rice

Readiness
Instructional materials provided
Carrying out experience
Evaluating the experience

"KINDS OF LEARNING EXPERIENCES

U.S.O.

Unit
Short-term
Ongoing (centers of interest)

"AREAS FOR EVALUATION

I Am Same

Interaction among children
Atmosphere of classroom
Materials
Status (health, social, interests)
Achievement
Methods and procedures
Experiences, worth of

"USES OF EVALUATION

Pragg

Progress and grade placement
Reports to parents
Analysis of pupil difficulties
Guidance
Grouping

* * * * *

"IMPROVING SCHOOL DISCIPLINE

Port Cages

Planning of standards and rules
Environment, improvement of

Routines, training in
Teaching, improvement of
Conferences
Analysis of difficulties
Guidance procedures
Evaluation and follow-up
Self-control emphasis"

25. The Board has not adduced statistics as to the race of the examiners or examination assistants who have conducted the oral examinations other than to observe, at a recent large-scale examination, that of approximately 200 persons serving as examination assistants over 30, or 15%, were Black or Puerto Rican.

Furthermore, the racial statistical survey is not broken down according to grades received by candidates on the components of examinations (i.e., scores on written, essay, short-answer, oral, appraisal of record, etc.).

Interim Injunction (Mansfield, *C. J.*) filed on July 23, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al., Plaintiffs, -against- THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., Defendants.	CIVIL ACTION 70 Civ. 4141 ~~TEMPORARY RESTRAINING ORDER~~ INTERIM INJUNCTION

This cause came on to be heard on plaintiffs' motion for a preliminary injunction, and the Court, after due deliberation, rendered an opinion filed on July 14, 1971, which opinion constituted its findings of fact and conclusions of law. It appearing to the Court that pending settlement of a preliminary injunction, temporary relief is appropriate, it is

ORDERED that, pending the settlement of a preliminary injunction, defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them be and they hereby are:

(1) restrained from announcing or conducting further examinations for supervisory service positions in the New York City School System;

(2) restrained from promulgating or otherwise publishing any new eligible lists for supervisory service positions in the New York City School System;

(3) restrained from using or permitting to be used outstanding eligible lists for supervisory service positions in the New York City School System in making appointments or assignments to vacant supervisory service positions, provided however, that this order shall not affect the validity of any other requirements for appointment or assignment to supervisory service positions established pursuant to law; and it is further

ORDERED that the parties are directed to attempt to agree upon a proposed preliminary injunction order to be submitted to the Court on or before ~~August~~ Sept 6, 1971, and failing such agreement the parties may submit their respective proposed orders to the Court on the aforesaid date; and it is further

ORDERED that defendants' time to submit opposing papers on plaintiff's motion to declare the action a class action is extended to ~~August~~ Sept 6, 1971.

Dated: New York, New York
July 23, 1971

S/ WALTER R. MANSFIELD
U.S.C.J.

Affidavit in Opposition to Motion of Marvin Weingart verified on August 31, 1971 and submitted on September 2, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE and LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

BOARD OF EXAMINERS, et al.,

Defendants.

CIVIL ACTION
70 Civ. 4141

AFFIDAVIT

- -X

STATE OF NEW YORK)
: SS;--
COUNTY OF NEW YORK)

'71 SEP 2 PM 4 20
LAW DEPARTMENT
CITY OF NEW YORK

MARVIN WEINGART, being duly sworn, deposes and says:

1. I am an elementary school principal assigned by the Board of Education as a Unit Head of the Board of Examiners of the Board of Education of the City of New York, one of the defendants herein, and submit this affidavit in support of defendant Board of Examiners' proposed preliminary injunction.

2. As Unit Head, I am responsible for the preparation and the administration of the examinations for most elementary school licenses. I have been functioning as a Unit Head since September, 1968. Prior to that time, beginning in September, 1962, I served as principal of P.S. 158, Brooklyn, and P.S. 345, Brooklyn. From September, 1959, to June, 1962, I served as an assistant principal at P.S. 129 in Manhattan, spending one year of that time on assignment to the Board of

Examiners. From September, 1955, to June, 1959, I was a teacher of English, Flushing High School. From September, 1953, to June, 1955, I was a teacher of English at Junior High School 73, Brooklyn. From 1950 to 1953, I was a teacher of Common Branches at P.S. 46, Manhattan.

3. I hold a B.S. in English Education, New York University (1950), and an M.A. in Elementary Education, New York University (1951).

4. In carrying out my responsibilities as Unit Head, I personally supervise the preparation of all questions contained in every examination under my jurisdiction. I do this in consultation with experts in various fields, making certain that the questions on the examination are related to the duties prescribed for the job by the Chancellor. I performed this function in connection with the development of the elementary school principal examination which commenced with a written examination administered on November 3, 1970 (hereinafter "the 1970 elementary school principal examination").

5. In its proposed preliminary injunction the Board of Examiners requests the Court to permit the promulgation and use of the eligibility list for the position of Principal, Day Elementary School, based

on the 1970 examination therefor. The Board of Examiners contends that the examination itself and its administration substantially meet the constitutional criteria enunciated by the Court in its opinion. The Board asserts that the promulgation of the aforesaid eligibility list will fulfill the objective articulated by the Court, namely, staffing the schools of New York City with qualified personnel who have been selected by a valid examination. This affidavit is intended to set forth facts in support of the above contentions.

6. Each and every question on the 1970 elementary school principal examination is related to the job of elementary school principal.

A. Both the written test and the interview test selections consist of questions concerning practical problems facing an urban school administrator today. (Written test attached as Exhibit 1.)

B. The short answer questions clearly test the applicant's knowledge in the field of education, dealing with such matters as curriculum design, pupil evaluation, testing procedures, program evaluation, supervisory functions, instructional materials, human relations and community relations.

C. The two essay questions deal with real-life situations regularly confronting the principal of an urban elementary school. The first essay question describes an inner-city school riddled with the kind of

problems to which there are no glib answers. Certainly, textbook regurgitation could not possibly supply the answers to the problems posed. The situation is designed to elicit a thoughtful analysis from the candidate which can test his ability to deal with the realistic problems of the job.

The second essay question consists of ten realistic and practical situations requiring decisions that every school principal must make. The candidate is asked to analyze the situation, indicating the additional information, if any, that he should obtain and the factors he should consider in reaching a decision or arriving at a course of action, and the actions he should take with respect to each situation. These problems are job related in the most meaningful sense of that term.

D. The interview test selections also call for a practical approach to school problems, with an emphasis on inter-personal relations. Additionally, the test seeks to determine the applicant's abilities in oral discussion. He is rated on such qualities as speech, comprehension of problems, definiteness and practicality of proposals, clarity of explanations, resourcefulness and ability to establish rapport with other people. Different interview test selections are used on different examination days. (Copies of all interview test selections are attached hereto as Exhibit 2).

7. Numerous changes have occurred since the 1964 elementary school principal examination which have increased the participation of blacks and Puerto Ricans

in the 1970 examination and have enhanced their prospects for success in this examination.

A. The Board of Education's liberalization of eligibility requirements for this examination has enabled a large number of blacks and Puerto Ricans to become eligible. In the 1964 examination, an applicant had to have at least 5 years of teaching experience, plus 3 years of supervisory experience, in addition to educational requirements, in order to be eligible to take the examination. In 1970, an applicant had to have 4 years of teaching experience and 1 year of supervisory experience. However, an applicant could substitute a college supervised internship for the supervisory experience requirement. Thus, an applicant in his fourth year of teaching could qualify for the examination. The effect of these changes is illustrated by the following figures:

	# Applicants	Black or Puerto Rican Applicants Identified From Statistical Survey Ordered by the Court	%
1964 Elem. Prin.	449	6	1.3%
1970 Elem. Prin.	2369	279 (Undoubtedly more who are not identified)	12%

B. There have been significant changes in the nature of the testing and in the weighting of the various parts of the examination. Some of these changes have implications with respect to the performance of minority group applicants. For example, the 1964

examination gave numerical consideration to training and experience. Since very few minority group applicants have been in the system long enough to have extensive experience, it was believed by the Board of Examiners that this consideration may have worked to their detriment. Accordingly, the Board eliminated numerical consideration of training and experience from the weighted average for this examination. Furthermore, the interview test was given greater weight in the 1970 examination. In 1964, the interview test was weighted 20, with the written test weighted 40. In 1970, the interview test was weighted 50, with the written test weighted 50. This change was made partly in response to the contention that minority groups do less well on written examinations than on oral presentation, and also reflected the views of members of a Committee of professionals and interested laymen who were consulted with regard to various testing procedures.

C. Since the 1964 examination, significant changes in rating procedures and criteria have been made. The standards for written English were liberalized. Demerits assessed for diction errors were reduced from 2 to 1, and demerits for spelling errors were likewise reduced from 2 to 1. Moreover, the average number of permissible demerits per page was changed from 4.0 to 5.0.

The criteria used for rating an applicant's performance in his present position were arrived at in consultation with Community School Boards, Community Action Groups and currently practicing administrators who identified the most significant elements in evaluating performance on the job. This extensive survey, prior to the recommendation of the criteria to be used, was made possible by funds provided by the United States Office of Education.

D. Many more black and Puerto Rican examination assistants were involved in formulating and rating the tests in 1970 than were utilized in 1964. Black and Puerto Ricans acted as assistant examiners in every stage of this examination. Of the 9 examination assistants at the first consultation meeting, 2 were black. Of the 10 who submitted essay questions, 2 were black; of the 4 who prepared the rating guides for the essays, 1 was black.

Moreover, every effort was made to recruit minority group college professors and principals to conduct the interview tests. Since New York City had so few black and Puerto Rican principals who were not involved as applicants, the Board of Examiners recruited 13 black principals from Philadelphia, Washington, Mount Vernon, N.Y., and Montclair, N.J., to assist. All in all, out of approximately 200 assistants used in

conducting interviews, about 35 were black or Puerto Rican.

E. As part of the Board's effort to improve examination procedures over those used in the 1964 examination, the Board consulted with many groups and individuals. The primary motivation for these consultations was to insure the selection of appropriate individuals for the job by the use of examinations which were intensely job related. For example, I personally visited the following institutions in an effort to develop examinations as job related as possible:

1. New York City Personnel Division to discuss use of the Experience Interview, the rating sheets utilized and other interview techniques used.

2. American Telephone & Telegraph Company Management Assessment Center to observe and confer regarding techniques used to identify personnel with management potential.

3. Lehman College, to discuss possible use of videotapes to simulate lessons, conferences, school personnel in action, etc. Our hope was that through videotapes we might actually bring the classroom and the school situation to the test room.

4. Hunter College, to preview films that might be used as the basis of an interview or supervision test.

5. P.S. 78 Bronx, to evaluate the use of a videotape machine in the classroom, to see

whether this technique could be adapted for testing purposes.

Some of the suggestions arising out of these visits have been incorporated in planned examinations.

In addition to these visits, I conducted a meeting on December 12, 1969, at which the members of the Board of Examiners met with Community Board Members, college professors of education (including well-known and highly-regarded blacks) and industry personnel officials. This is the meeting referred to above which resulted in a greater emphasis being given to the interview test. Other meetings were held in an effort to improve the quality and job relatedness of this examination. For example, a meeting was held with Mr. David Seeley and other representatives of the Public Education Association, and another meeting was held with the head of the Elementary Division of the Board of Education and other administrators, including 2 black principals, in order to obtain their views with regard to testing procedures.

8. The 1970 examination reflects the most intense effort on the part of the Board of Examiners to conduct an examination which is thoroughly job related. In my opinion, we succeeded in this effort.

Marvin Weingart

SWORN to before me this
31st day of August, 1971.

Constance Vairo
Notary Public

CONSTANCE VAIRO
NOTARY PUBLIC, State of New York
No. 24-9421950
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1972

Affidavit in Opposition to Motion of Thomas McGee verified on September 8, 1971 and submitted on September 9, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BOSTON M. CHANCE and LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

- x

CIVIL ACTION
70 Civ. 4141

AFFIDAVIT

OFFICE OF CORPORATION COUNSEL
'71 SEP 9 AM 9 27
LAW DEPARTMENT
CITY OF NEW YORK

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

THOMAS McGEE, being duly sworn, deposes and says:

1. I am the Administrator of the Board of Examiners.

2. This affidavit is submitted in support of defendant Board of Examiners' proposed preliminary injunction.

3. Although the Board of Examiners maintains no records on the racial or ethnic background of examination candidates, I have prepared an analysis of the pass-fail results on the 1970 elementary school principal examination utilizing the identification information contained in the Court-ordered survey for prior examinations. This analysis yielded the following data:

1970 Elementary School Principal Examination

	All Candidates	All Candidates Identified from Court Ordered Survey	Candidates Identified as Black or Puerto Rican from Court-Ordered Survey	Candidates Identified as White or Other from Court-Ordered Survey
Pass	1,584	1,094	224	870
Fail	519	170	55	115
Total	2,103	1,264	279	985
Passing Percentage	75.3	86.5	80.3	88.3

4. I also analyzed the pass-fail results for the 1970 elementary school principal examination to determine how persons listed as acting elementary school principal by the Department of Personnel of the Board of Education performed on this examination. Of 46 such persons, 39 completed the examination of which 37 passed and 2 failed.

Thomas McGee

Sworn to before me this
8th day of September, 1971.

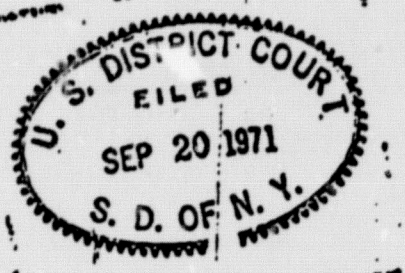
Notary Public

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Commissioner of Deeds, City of New York
Kings County Clerk - No. 2-551
Commission Expires July 1, 1973

Memorandum regarding Preliminary Injunction (Mansfield, *C. J.*) filed on September 20, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



BOSTON M. CLARKE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141

Memorandum Regarding Preliminary Injunction

MANSFIELD, Circuit Judge:

Plaintiffs and the Board of Examiners ("the Board") have submitted forms of a proposed preliminary injunction which differ in certain significant respects, together with supporting memoranda, affidavits and other papers. After reviewing these documents we have today signed and entered an order incorporating plaintiffs' proposals with some modifications.

The major differences between the parties relate to (1) the Board's promulgation of lists based upon examinations given by it since this action was commenced, including that concluded on November 3, 1970, for the position of Principal,

Day Elementary School, and (2) the Board's conduct of future examinations and its promulgation of lists based thereon pending final determination of the action. As for the first of these categories the Board asks permission to promulgate lists based upon its recent examinations. Its request for permission to promulgate lists based on the November 3, 1970, examination is supported by (1) the affidavit of Marvin Weingart dated August 31, 1971, to the effect that that examination has met the standards for job-relatedness referred to in our opinion, and (2) by the affidavit of James McGee dated September 8, 1971, stating that an analysis of scores of approximately 60% of the candidates taking that examination reveals that 80.[illegible]% of the Black and Puerto Rican candidates passed which was higher than the percentage for Black and Puerto Rican candidates for earlier examinations and close to the rate of white candidates (88.3%). Plaintiffs object to the Weingart affidavit on the ground that it seeks to reopen and relitigate issues which were explored in earlier hearings and which were the subject of findings in our decision dated July 14, 1971, rendered after defendants declined the opportunity to present additional evidence, following which the record was closed for purposes of deciding the application for preliminary injunctive relief. Plaintiffs also question some of the statements made by

Mr. Weingart, whom they have not had the opportunity to cross-examine, and correctly point out that the November 3, 1970, examination, together with evidence pertaining to it, was before us and was debated before we rendered our decision.

As for the McGee affidavit, plaintiffs attack the new statistics offered by it, principally on the ground of incompleteness, since it fails to furnish the pass-fail ratios for almost 40% of the candidates who took the November 1970 examination. From the figures presented by it with respect to 60-odd percent of the candidates, the balance of almost 40% must have had very low scores, which would indicate that the two groups (i.e., the 60% and the 40%) differ radically and that the figures presented by the Board cannot be used as a basis for extrapolation for all candidates. Furthermore, the Board has not disclosed the "cut-off" score used by it, which decides the percentage of passing candidates and hence the comparison between such percentages for different racial groups. As one would expect, plaintiffs want discovery for the purpose of determining all of the facts, including relevant statistics, the procedures used by the Board, and the extent to which they were affected by the pending litigation.

Although the affidavits presented by the Board with respect to the November 3, 1970, examination indicate that the

Board has been making efforts to construct examinations that will be job-related, and that their efforts have been accompanied by a sharp reduction in the discriminatory impact caused by its examinations, we do not believe that this evidence warrants our changing the findings made on the basis of the more extensive evidence introduced at our earlier hearings, where plaintiffs had the right of cross-examination, which they do not have with respect to Weingart and McGee affidavits.

In the meantime our injunction will restrain conduct of further examinations or promulgation of further eligibility lists by the Board, subject to its right upon reasonable notice to plaintiffs to apply for modification of our order to permit further examinations. Presumably such an application would be made after thorough analysis and disclosure to plaintiffs of all pertinent facts. This does not mean that we propose to act as a super-Board with respect to such examinations, since we lack the expertise, time and facilities required to participate in detail in the construction of examinations or in a meaningful analysis of test results. If this case is to be brought promptly to final adjudication, the parties must cooperate fully in making available to each other all relevant facts (including, for example, the <u>entire</u> sample of candidates who took the November 3, 1970, examination, the scoring of both oral and

written portions, and the cut-off score used by the Board), and in devising appropriate criteria. While plaintiffs appear as adversaries in this proceeding, we urge them, in undertaking these important duties, to approach the task as flexibly and objectively as possible, with a willingness to yield to the public interest at stake rather than to insist on specific criteria that may be impractical or unrealistic, whether in the field of predictive validity or otherwise.

In the meantime we fail to see that our preliminary injunction will harm the public or the administration of New York City schools, since supervisory vacancies can be filled by acting supervisory personnel appointed pursuant to a system established by the Board of Education and permanent appointees would not have gained tenure. (Chs. 116 and 117 and 1102 New York Laws 1971) Indeed, we note that a resolution along these lines has already been presented to the Board of Education for its consideration, which seems to be a constructive step toward an interim solution of the difficult problems that must be solved.

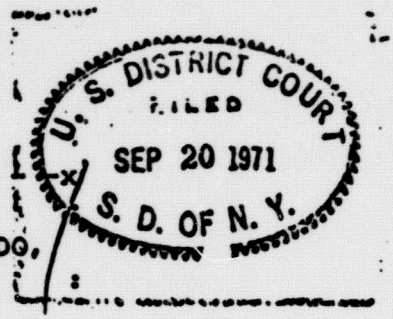
U.S.C.J.

Dated: September 17, 1971.

Preliminary Injunction (Mansfield, *C. J.*) filed on September 20, 1971

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKOWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York,

Defendants.

70 Civ. 4141

PRELIMINARY INJUNCTION

Plaintiffs having moved for a preliminary injunction, and the court having considered the complaint, as amended, the affidavits, exhibits and briefs submitted in support of said motion and in opposition thereto, and all other papers heretofore filed, together with certain

statistical evidence compiled pursuant to court order, and having heard oral arguments and received evidence in open court, and having made its findings of fact and conclusions of law in its opinion filed July 14, 1971, it is

ORDERED, that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are, pending the determination of this action:

(1) restrained from conducting further examinations for supervisory positions in the New York City School System and from processing, grading or in any way continuing to administer any part of any supervisory examination procedure in the New York City School System;

(2) restrained from promulgating eligible lists or issuing licenses on the basis of examinations for supervisory positions in the New York City School System which have been, or are now in the process of being, administered;

(3) restrained from making, authorizing or allowing regular or permanent appointments or assignments on the basis of any lists previously promulgated pursuant to examinations for supervisory positions in the New York City School System;

(4) ordered to make all vacant supervisory positions in the New York City School System available on an acting basis to candidates who satisfy the educational and experience qualifications

established by state law and by the Chancellor and the Board of Education of the City of New York, including such eligibility requirements as the latter may hereafter establish on an interim basis for selection and appointment of acting supervisory personnel, without regard to whether such persons presently hold supervisory licenses, or regular appointments or assignments; and it is

FURTHER ORDERED, that any party may, upon at least one (1) week's written notice to counsel for all other parties, apply for modification of this order to permit further examinations for supervisory positions, and the promulgation of lists, issuance of licenses, and making of appointments based thereon, provided all essential relevant data with respect thereto have first been made available to all other parties and an opportunity afforded to such other parties to review such data and to confer with the applicant with a view to resolving any differences that may arise and reaching agreement upon new examination procedures that are to be the subject of such application.

Dated: September 17, 1971.

U.S.C.J.